IN THE STATE OF SOUTH AUSTRALIA
ROYAL COMMISSION
BEFORE MRS I.E. STEVENS, ROYAL COMMISSIONER

HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, 19 JULY 1995 AT 10.15 A.M.
COMSR: This is the first day of sitting of this Royal Commission. I will start the hearing by asking the Secretary to the Royal Commission to read the Commission.

SECRETARY: South Australia, Her Excellency, Dame Roma Flinders Mitchell, Companion of the Order of Australia, Dame Commander of the Most Excellent Order of the British Empire, Governor in and over the State of South Australia.

To: Iris Eliza Stevens

Greetings

Whereas:

1. On 9 July 1994, the Honourable Robert Tickner MP, Minister for Aboriginal and Torres Strait Islander Affairs in the Commonwealth Government signed a declaration pursuant to s.10 of the Aboriginal and Torres Strait Islander Protection Act, 1984, which declaration prevented the construction of a bridge between Hindmarsh Island and the mainland at Goolwa (hereinafter called 'the declaration');

2. In making the said declaration, the aforesaid Minister relied upon a report made to him by Professor Cheryl Saunders AO, which report made reference to secret 'women's business' which was more particularly described in sealed envelopes annexed to or attached to the report.

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

4. There has been significant disagreement within the South Australian Aboriginal communities regarding the 'women's business' and the allegations.

5. The Government is or was contractually bound to construct the bridge and is desirous that the construction of the bridge should proceed unless to do so would be unreasonable and inappropriate having regard to Aboriginal tradition.

6. It is necessary to investigate the allegations in order:
(i) to provide a factual basis for the resolution
of the disagreement within the South
Australian Aboriginal communities;
(ii) to enable the South Australian Government to
determine, as a matter of policy, whether it
would be unreasonable and inappropriate,
having regard to Aboriginal tradition for the
construction of the bridge to proceed; and
(iii) to enable the South Australian Government to
determine whether it should make further
submissions to the Commonwealth Government
(including to any inquiry established by the
Commonwealth Government) relating to the
declaration made by the aforesaid Minister and
to provide a factual basis for any such
submissions.

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

1. Whether the `women's business' or any aspect of the
`women's business' was a fabrication and, if so:
   (a) the circumstances relating to such a
   fabrication;
   (b) the extent of such fabrication; and
   (c) the purpose of such a fabrication.

2. You may seek and obtain such advice or assistance on
matters relating to Aboriginal tradition as you may
consider necessary for the purpose of your inquiry,
and, in particular, you may seek information,
including relevant documents and records, from
all agencies of the Government which are hereby
directed to provide you with such assistance as
you may require.

3. In conducting your inquiry and in your report, you
are required to:
   (a) avoid prejudicing any judicial proceedings
   relating to the declaration made by the
Minister for Aboriginal and Torres Strait Islander Affairs of the Commonwealth Government;

(b) protect the confidentiality of any information which could properly be regarded as confidential whether pursuant to Aboriginal tradition or otherwise; and

(c) comply with s.35 of the Aboriginal Heritage Act, 1988, and for this purpose, you may conduct your inquiry or parts of it in private and to report in part by way of confidential report and/or to report by way of general descriptions or summaries, or to take such other steps as you consider to be appropriate to comply with paragraphs (a), (b) and (c) hereof.

4. This appointment does not prevent your appointment to any other public office under the Crown in right of the State of South Australia, which appointment is intended to facilitate and assist your inquiry.

5. You are required to make your inquiry expeditiously and to furnish a final report not later than 1 September 1995.

In these Terms of Reference:

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

'women's business' means the spiritual and cultural significance of Hindmarsh and Mundoo Islands, the waters of the Goolwa channel, Lake Alexandrina and the Murray Mouth within the Aboriginal tradition of Ngarrindjeri women which is crucial for the reproduction of the Ngarrindjeri people and of the cosmos which supports
their existence.

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

By command, the Premier.

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

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

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

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

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

The Commission, in conducting its inquiry, has
specific directions incorporated into the Terms of
Reference relating to the matters of prejudice to
current court proceedings, to confidentiality and to
privacy. These directions will indicate the extent to
which the evidence can be taken in public.

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

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

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

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

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

Arrangements have been made for the media to have
access, during the course of the hearings, to an area on
the third floor of this building. I would ask members
of the media to extend to witnesses the courtesy of not
approaching them within the precincts of the building.

I am advised that there are witnesses who could feel
under pressure and even threatened by such approaches.
Accordingly, I ask you to respect their feelings.

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

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

ADJOURNED 10.26 A.M.

RESUMING 10.41 A.M.

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

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

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

COMSR: You have leave to appear.

MR TILMOUTH: I think we have sorted out the next
appearance. May it please the Commission, I appear for
the Ngarrindjeri men, but more particularly George
Trevorrow, Tom Trevorrow, Victor Wilson, Robert Day and
Henry Rankine. I don't formally seek leave to appear at
this stage because we are unaware of any precise
allegations, but I ask the Commission to note our
interest on behalf of those men at this stage. My
appearance is with Mr Kenny, my instructing solicitor.
COMSR: I note that you are foreshadowing that you may make an application for leave. Is that the situation?

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

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

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

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

COMSR: Yes. The ALRM has leave to appeal.

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

COMSR: You have leave to appear.

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

COMSR: You have leave to appear.

MRS SHAW: I seek leave to appear as junior counsel to Michael Abbott QC, senior counsel, on instructions from Piper Aldermans. I propose to represent the five Ngarrindjeri women who, in May last year, had the courage to come forward and challenge the validity of the Hindmarsh Island secret women's business.

COMSR: Perhaps if you give me the names of those persons.

MRS SHAW: The names of those persons are: Dolcie Wilson, Mrs Dorothy Wilson, Mrs Bertha Gollan, Mrs Audrey Dix, Mrs Rita Wilson. I indicate to your Honour that we have had contact with other Ngarrindjeri women who will, no doubt, seek to be represented by us, or certainly give evidence to the Commission.

COMSR: You're seeking leave on behalf of Mr Abbott and yourself?

MRS SHAW: Yes, I am.

COMSR: You have leave to appear then in person for the persons that you have named.

MRS SHAW: We also ask it to be noted that we have the strongest objection to the ALRM being represented and pursuing any particular course in the Commission. But we will seek to argue that on Monday.

COMSR: That can be argued on the next occasion.

MR WARDLE: I seek leave to appear for Mrs Betty Fisher.

COMSR: I take it that she has a specific interest though, a special interest?

MR WARDLE: She does.

COMSR: You have leave to appear.

MR SYKES: My name is Sykes and I seek leave to appear for Allen Dell Campbell (who is more commonly known as 'Chirpy'), Amelia Campbell and John Gregory Campbell. They are direct ascendants of the people who have an interest, or planning members of the Hindmarsh Island area, and they have a direct interest in this
Commission. I seek leave to represent them.

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

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

COMSR: You have leave to appear.

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

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

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

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

MR WHITE: That is correct.

COMSR: I will note that.

CONTINUED
MS O’CONNOR: I appear for the following Ngarrindjeri women before this Commission.
I am instructed by Dr Doreen Kartinyeri, Margaret Roberts, Margaret Jacobs, Rhonda Agius, Edith Rigney, Denise Karpany, Glenys Wilson, Bronwyn McKenzie, Vicki Hartman, Shelley Sumner, Eileen McHughes, Michelle Saunders, Shirley Peisley, Muriel Van Der Byl, Veronica Brodie, Margaret Brodie, Grace Sumner, Selina Sumner, Janice Rigney, Dot Shaw, Hazel Wilson, Daisy Rankine and Ellen Trevorrow.
The women do not seek representation before this Royal Commission. They do not recognise the authority of this Commission.
COMSR: I am sorry, I must have misunderstood you.
MS O’CONNOR: If I have, I meant I am simply instructed by them to appear to explain to your Honour why they do not seek leave to appear before this Royal Commission.
COMSR: You are not seeking leave. Are you foreshadowing that you may be seeking leave to appear?
MS O’CONNOR: I am instructed by the women whose names I have mentioned. They do not seek leave to appear before this Commission. They do not seek representation before this Commission.
COMSR: I will note then that is the case.
MS O’CONNOR: They have reasons and they have instructed me to read a statement, prepared by them, which reflects those reasons.
I understand that a formal approach was made to your Honour, on an earlier date.
COMSR: Just one moment.
MS O’CONNOR: I wonder if we could deal with the applications for leave to appear, at this stage, and then perhaps you can explain to me what it is precisely that you wish to do.
COMSR: You are not seeking to represent anyone before the Commission?
MS O'CONNOR: That's correct.
COMSR: I will note that you are not seeking leave to appear.
MS O'CONNOR: No.
MR GRIFFITH: I seek leave to appear for the Commonwealth Minister for Aboriginal & Torres Strait Islander Affairs, limited to making short submissions, which I would ask leave to make now, dealing with issues of Commonwealth legislation and Commonwealth power and the relationship to this inquiry. I would then seek to withdraw. May I make those submissions?
COMSR: All right. You are seeking leave to appear?
MR GRIFFITH: To appear this morning, limited to this morning, and to make short submissions, and then to retire.
COMSR: I take it that you are here from interstate and will be returning, is that right?
MR GRIFFITH: I will not return.
COMSR: You are not returning. I meant returning from whence you came.
MR GRIFFITH: I will return from whence I came, but I will not be returning from whence I am.
COMSR: You have leave to appear.
MR GRIFFITH: My instructions are that there are two short matters particularly that the Minister will wish to put and asks merely to put them and to retire. And I desire to put those, on his behalf. Of course, the Commission is familiar with the historical background, because the Terms of Reference, which were read out this morning, are built on that. But, of course, the original matter was the Minister's declaration under s.10 of the Commonwealth Heritage Act preventing the construction of the Hindmarsh Island bridge, and the course of the enquiries that, before
making the declaration, that the Commonwealth Minister receives a report under sub-s.10 (4) of the Commonwealth Act from Professor Cheryl Saunders concerning the significance of the area to Aboriginals is described in the judgment of O'Loughlin J given 15 February 1995.

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

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

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

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

The first proposition that the Minister would like to make is that he submits that the Royal Commission has no power to inquire into the conduct of a Commonwealth inquiry generally. And, in particular, into the Commonwealth inquiry undertaken by Professor Saunders
under the Commonwealth Heritage Act, prior to the making
of the declaration by the Minister for Aboriginal &
Torres Strait Islander Affairs.

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

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

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

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

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

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

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

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

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

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

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

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

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

It is submitted that, if by the use of its compulsive powers under s.10 of the South Australian Act this Commission seeks to require witnesses to the Commonwealth inquiry, which has already taken place, or those who may give evidence to the inquiry, which is to
occur, as to what they said in the inquiry, or to
disclose their sources, the efficacy of the Commonwealth
inquiry process would be impaired.

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

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

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

The third matter that we draw to the attention of
the Commission is that it is submitted that the
Commission cannot compel Aboriginal persons to disclose
secret spiritual beliefs in a manner which would
infringe the Racial Discrimination Act by limiting or
impairing the enjoyment of human rights of Aboriginal
persons in a way that meant that they did not enjoy
those human rights on an equal footing with other
members of the community.
The Minister understands that those matters are being ventilated in the Full Court by way of submissions, particularly by Robyn Layton QC, who has already announced her appearance. And the Minister, for the moment, does no more than confirm his view as to the relevance of the operation of the Commonwealth Racial Discrimination Act to matters of this sort.

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

COMSR: Thank you for the courtesy in attending and your very helpful comments. Are there any other applications for leave to appear?

MS O'CONNOR: Perhaps if I had worded it the same way as the Commonwealth had worded it, I would have been able to say what I wanted to say. I simply seek leave to appear for the women and make a statement to the Commission, then I will be withdrawing.

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

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

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

I seek leave to read that letter.

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

MS O'CONNOR: Yes, shorter than the Federal one. That
was two short points. Mine is probably one and a half.

COMSR: All right.

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

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

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

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

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

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

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

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

Mabo is here to stay.

Along with the Mabo decision came the realisation
that Aboriginal people were not just a nomadic,
unorganised group of people. Aboriginal people are not
all the same. We speak different languages, have
different ceremonies, hunt and gather food in different
ways. We are all directly associated with our physical
environments. And, more importantly, there is the
recognition that Aboriginal people have a spiritual link
to that same whole environment - land, water and the
heavens.

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

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

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

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

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

There is also the issue that there is to be a
Federal enquiry into this matter. We are prepared to
participate and co-operate fully with this inquiry,
because we feel that we can be confident that this
inquiry will investigate the matters sensitively and
appropriately and with the respect our spiritual beliefs
warrant. We believe the Federal inquiry will achieve
the appropriate goals of uncovering the actual
fabrications in this matter and the motives and
corruption associated with those fabrications, determine
who is to benefit from those fabrications and make the
necessary recommendations.
The timing of Premier Brown's Royal Commission is
e entirely inappropriate. The Federal Court is still to
determine the appeal before it and there is an appeal
before the South Australian Supreme Court that has yet
to be determined against the refusal yesterday to grant
an injunction. What is the hurry? Whose interests are
being served by the holding of this Royal Commission
now?
In addition to that, the women come today with two
items they wish to show you, traditional items. One is
a women's law ceremonial stick and one is a painting.
You will recognise that I have shown a
great deal of latitude as far as your statement is
concerned. After all, this is an inquiry. However,
there must be some limits.
What is it that you wish me to do?
The women have come here today with two
traditional items important to the knowledge that this
inquiry is about. One is a painting -
You wish to tender them?
No, they simply wish to show them to
your Honour.
One is a painting and one is a ceremonial - a women's law ceremony stick which is about women's law and which they wish to show to your Honour. They are secret women's business items and they would like to show them to your Honour if all the men would vacate the room.

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

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

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

MS O'CONNOR: That's correct.

COMSR: Are there any other matters?

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

COMSR: I'm afraid that it's necessary for you to demonstrate some special interest over and above that of the normal member of the public. Let me say that the making of statements is not really part of the function of the inquiry, but certainly I wouldn't propose to allow a member of the public who has no interest that could be called 'special interest' to make a statement to the Commission. If you wish to put in a document of
some sort to counsel assisting me, by all means do so.

MR TOBIN: Especially to look at the philosophical implications.

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

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

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

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

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

HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

MONDAY, 24 JULY 1995

RESUMING 10.15 A.M.

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

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

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

MR SMITH: The programme for today is: first, to hear submissions from counsel on the conduct and ambit of the Terms of Reference; secondly, to hear submissions on any procedural matters, such as matters related to confidentiality, prejudice, et cetera; and, thirdly, to hear submissions, if it is appropriate at this time, on the questions of conditions to be imposed on leave to appear, rights of cross-examination, et cetera.
I indicate to you and to those at the bar table that I will not be making an opening statement this morning, but I can indicate that I will be asking you to adjourn to Thursday of this week, the 27th, at which time it is envisaged evidence will commence. Thank you.

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

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

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

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

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

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

May I take you to the preamble. You will note that there are six numbered sections by way of preamble which leads to a statement: `I, the Governor, with the advice and the consent of the Executive Council, do hereby appoint you to be a Royal
Commissioner to inquire into and report upon the matters set out in the following Terms of Reference.

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

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

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

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

I'm not quite sure where that definition came from. I point out that it contains the phrase `Aboriginal tradition', which in turn is, we submit, some definition to an exclusive definition which is contained immediately above the inclusive definition of `women's business'.

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

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

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

I observe that `secret women's business' is not in anywhere defined or the subject of any attempted definition. That is, in our submission, of some
importance because in para.3 we read:
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There have been allegations that the "secret women's business" is a fabrication.'
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The drafter of this Royal Commission, on the one hand, uses 'secret women's business' in paragraph no.2 and paragraph no.3 and then deals with 'women's business' in para.4 and 'women's business' in the Terms of Reference.

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

I point out that the third paragraph of the preamble says:
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There have been allegations that the "secret women's business" is a fabrication.'
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But your Terms of Reference are whether the women's business, or any aspects of the women's business, was a fabrication. We say that and do say that the Terms of Reference are wider than by using the phrase 'women's business'. It is a wider expression than 'secret women's business'.

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

In our submission, what this Royal Commission is all about is an examination of 'women's business' as it is referred to in the definition section, which is a general definition, so it's about women's business in
general. It's about `secret women's business' in particular because the preamble directs your attention to the fact that there were allegations made by unspecified persons that the secret women’s business was a fabrication. So, you are directed to inquire into and report upon women’s business in general, the secret women’s business in particular and to investigate whether or not any aspect, including the specific aspect of secret women’s business, was fabricated and, if so, the circumstances relating to such fabrication to the extent of such fabrication and the purpose of such fabrication.

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

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

The other aspect which is important is the question of fabrication. My reading of the materials, that is the media materials that I have, suggests that the word
'fabrication' was one which was first utilised by members of the media in describing some concerns that they, as members of the media, felt about the way in which Professor Saunders proceeded and, indeed, the way in which some of the informants of Professor Saunders proceeded, principally Dr Fergie and Ms Doreen Kartinyeri.

INTERJECTOR: Dr Kartinyeri if you please.

COMSR: Dr Doreen Kartinyeri.

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

INTERJECTOR: Show a bit of respect please.

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

As I'm sure you are aware, there are a number of meanings to the word 'fabricate'. We have had recourse to the normal avenues of dictionaries and it is obvious, of course, that 'fabrication' is open to a number of meanings. The Oxford English Dictionary speaks of two main definitions: The first being 'making or constructing'; and, the second being 'inventing in the sense of lying or embroidering, forging or making up a story'. It may be proposed to proceed on this basis that you adopt the more conservative definition initially, keeping your options open as to the evidence that you hear and the cross-examination on whether or not the women's business/secret women's business was manufactured or constructed on the one hand, or invented, in the sense of made up - that is, as a false and incorrect statement - on the other. It is one thing to manufacture and construct, it is another to devise or invent. But, it would appear to us to be essential for you, given the Terms of Reference in 1(a) (b) and (c)
that unless you come to a decision as to the interpretation of the word 'fabrication', you will be hard pressed to find what are the relevant circumstances, what is the relevant extent and what is the relevant purpose.

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

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

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

In essence, therefore, you will need, in our submission, to know exactly what the secret women's business is. Further, you will need to decide the interaction of the secret women's business in those
envelopes with the expression `women's business'
generally, because that is what your Term of Reference
is about.

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

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

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

MR TILMOUTH: It would be appropriate if I go next.
COMSR: I understand at the present time that
you haven't been given leave. You are neither seeking,
nor have you been given leave.

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

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

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

My submission to you was that the word
`circumstances' relating to such a fabrication must
necessarily include such things as: time or times, place
or places of fabrication, who was alleged to have been
present and who was alleged to have said what, if
anything, relating to the matter.

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

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

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

MR SMITH: If I could be heard and interrupt my learned friend? This is not an appropriate request to make, particulars in a Royal Commission. In any event, as much as I can, I have provided my learned friend's solicitor with a view about the way in which his clients, or at least some of them, are involved. That information did not constitute formal particulars in the way we understand it in a criminal trial or a civil trial, but I would suggest to my learned friend that if he confers with his instructing solicitor, he will know what, in broad terms, is alleged against his clients, or some of them, and he should have leave and make submissions on that basis, rather than have a foot in both camps, as it were. Is he appearing for the men? Does he have leave? Therefore, does he have standing to make submissions about the terms of reference?

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

MR TILMOUTH: It is impossible to get instructions on virtually nothing. We wrote on 10 July pointing out our interest in the matter and who we represented. We
sought assistance for legal funding. We have not had
the courtesy from anybody of a formal response.
The Attorney-General has gone on television on 15
July saying people will be funded, but as yet nothing
has been done about our application and your proper
inquiry, with respect, necessitates that the
circumstances are adequately investigated. That
includes a proper and reasonable cross-examination and a
proper advance inquiry about all the participants.
We cannot do any of those things because we do not
know what is being alleged and we have got no money in
which to embark upon a proper process. The men I
represent have not even been given proper preliminary
legal advice about the implications of this Royal
Commission for them.
COMSR: I think that is a matter that you should
discuss with counsel assisting, but as at present, as I
say, you are not making the application for leave to
appear and, therefore, I cannot invite you to make
submissions on the terms of reference, but I will
certainly hear from you if and when it should be the
case that you do appear.
MR TILMOUTH: As I said, we are put in this invidious
position.
COMSR: Yes, I understand your position and I am
inviting you to take it up with counsel assisting.
MR TILMOUTH: We are doing that.
COMSR: But not during the course of that
hearing.
MR TILMOUTH: I understand, and I would not do that,
but we have been doing that constantly and we cannot get
an answer. May I say one thing and I will leave it at
that? I understand, as well, that the Premier, for whom
this Royal Commission was instituted - it is by command
of the Premier - has made public statements that he does
not believe that the secret envelopes would be part of
this inquiry.
COMSR: Again, that is a matter that goes to
what the terms of reference mean and that is the matter
on which I have said I really cannot hear you at this
time.

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

COMSR: That may be so, when your position
becomes clarified I will hear you on all those matters.

Who is next?

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

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

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

Our submission is that where what is alleged is
unspecified - namely, that it is an allegation that
‘Women’s business’ is fabricated without saying what
aspect of ‘Women’s business’ - is it that which was
told to Dr Fergie? Is it that which was told to
Professor Saunders? Is it that which is in the secret
evervelopes? - it is for the persons making the
allegations to assert the fabrication and not to defend
the impossible and the unknown and the unspecified.

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

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

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

MS LAYTON: We are on Monday and I understand that
we are to start Thursday and we have got nothing. This
is the most rapid commission. This is no disrespect to
you, commissioner, because you have been given a time
frame in which to operate and have got to do the best
you can within that time frame, but the net practical
reality is that there is nothing on the table from which we can ascertain what it is that we are meant to do.

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

Assuming them to be broad, and Mr Abbott seems to preface that they are broad, then that encompasses all sorts of things in respect of those who may wish to tender evidence about whether or not it is fabrication. That goes for both sides. Insofar as people may be wishing to have material that is relevant to the broad, again, they would have to have a focus to enable them to assess what aspects are relevant. In particular, anthropological evidence.

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

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

Turning now to the meaning of 'Fabricated', as my friend Mr Abbott has indicated, there are a number of possible interpretations of that. We would assume that that would incorporate also: is it referring to a plan by a person or persons to lie about the existence of women's business? Is that part of the fabrication that is alleged? In which case, what was the plan and between whom? These need to be known so that the
persons who are alleged to have been involved in this
plan or construction or manufacture, can know that they
are one of the people being spoken of.

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

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

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

So I see the matter there as a twofold problem.
One, as to the relevance in the overall context, and,
two, if relevant, whether or not, because of
constitutional matters, they may ever be produced to this commission.

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

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

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

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

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

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

MR WARDLE: I think I am next. The preamble asserts two things of significance to this stage of the inquiry.
The first is that there have been allegations and the
second is that there have been significant disagreements
in relation to those. In my submission, it is not
possible for counsel to make any useful statement about
the terms of reference until we have at least sufficient
particulars to know what the allegations actually are
and who made them.
Furthermore, we need information about the areas of
disagreement that are said to exist in the preamble. So
I join with my friend Mr Tilmouth seeking further
details, whether they call those particulars or
otherwise.
MR ABBOTT: Could I make one response to something
my learned friend Ms Layton said?
COMSR: Yes.
MR ABBOTT: My learned friend suggested that my
clients were making allegations of fabrication in
respect of something they had not read. They are not
making allegations of fabrication about something they
have not read.
The comments and criticisms that they have made -
and whether they fall within the definition of
criticisms amounting to an allegation of fabrication
depends upon what construction you put upon that
terminology - is in relation to the reported utterances
of Dr Kartinyeri, Professor Saunders and Dr Fergie and
Dr Draper. In our submission, this Royal Commission
could and should not proceed without those who assert
that there is secret women's business being called upon
to put up or shutup.
MS PYKE: I would like to have it noted that I
adopt the submissions of Ms Layton and I would also like
to say that, at this stage, insofar as Dr Fergie is
concerned, we simply do not know what the allegations
are, whether there is some suggestion that she has been
implicit in some conspiracy to fabricate, whether there
is an allegation that her methodology as an
anthropologist was defective. We simply do not know what it is we are going to be called to meet. I understand there is anthropological evidence that may be given. I have not got any statement. I am not able to have my instructor take a proof from Dr Fergie. I understand this evidence is likely to be the first evidence called when the commission opens. I am in the position of simply not having any idea what I am here to represent in terms of representing Dr Fergie's interests. I reiterate that it seems to me that the allegation is that there has been a fabrication. It is important for us to know what it is being alleged. It is putting the cart before the horse to say that secret business must be amplified when what has actually started this commission is this allegation that it was fabricated. Certainly there is some basis for the allegation of fabrication and we are entitled to know that so that we can adequately represent the interests of our witnesses.

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

MR BOURNE: I foreshadowed previously an application for leave to represent Mr Doug Milera. I said then that he appears to be a person with a special interest in the commission. That certainly is his understanding, an understanding formed as much on assumption at this stage as on materials. In that regard, as to the unavailability of all of the material relevant for him to assess his position and certainly to seek legal advice in respect to it, I would respectfully adopt what has been said already this morning by Mr Tilmouth and by Ms Layton, but I do seek, nonetheless, to represent Mr Milera at this stage so
that I can complete the inquiry into relevant material.
I can make submissions on the basis that I can, as
presently instructed, with the view to providing such
information as we can assess as being relevant to the
commission.
COMSR: You have leave to appear.
MR BOURNE: I wish to say, in respect of that leave,
that we would not wish it to be taken to be a commitment
to give evidence in the matter, nor to be represented
for the duration of the commission, nor of the hearing.
We will assess our position as material is acquired and
as we become aware of the allegations which are to be
the subject of the inquiry.
With respect to what has been said already, it does
appear to me that a substantial issue arises out of the
submissions made by Mr Abbott with respect to whether
the terms of reference are different and significantly
different from the preamble which follows, particularly
in relation to the issue of secret women's business.
It does seem to me that the question of whether you
are to investigate women's business in a general sense
or secret women's business needs to be addressed very
closely. We certainly require clarity in respect of
that before we can assess our position.
My client has no particular knowledge of 'Women's
business' or 'Secret women's business'. His involvement
is more in relation to other matters. But with respect
to whether the inquiry is about 'Women's business'
generally or 'Secret women's business' we, for example,
would refer or advise the commission of the comments
made by the Honourable the Premier in announcing and in
setting up the commission. He is on record, as I
understand it, from an ABC radio interview, in response
to a question from a reporter:
'Will you make them open - '
I guess referring here indirectly to the commission:
'the Royal Commissioner - open the sealed envelope that
contains the women's business? I mean that seems to be
the central point here.'

The Honourable the Premier replied:

`No, no. My view is that's not the central issue at all. In fact, I would doubt very much whether in fact the Royal Commissioner will be offered the envelopes.'

Reporter:

`Well then how can you check whether it's true or not if you don't look what's in the envelope.'

The reply:

`Well that's not central to the term of reference that's been prepared by Cabinet. And you can understand that quite clearly. It has nothing to do - it doesn't refer to the secret envelopes and we are not expecting the Royal Commissioner to have the secret envelopes.'

COMSR: But what has that got to do with the way in which I interpret my terms of reference?

MR BOURNE: As I understood Mr Abbott's submission, it was to the effect that you must have the envelopes and you must investigate the secret women's business. That is the whole point of the commission. If that is the whole point of the commission, and it would seem from the preamble to the terms of reference that it looms large - if it is not the central issue, then what is the commission to achieve?

The commission is here to investigate things which are extraneous, that is, `Women's business' in a more general wider sense than the concerns that are contained in the preamble. It does seem that the terms of reference do not reflect very adequately the preamble, or they seem to address an issue which is somewhat wider than the very specific term as is used in the preamble. So, in order that I can advise my client, I would certainly be seeking a ruling as to whether `Women's business', either in the general sense or the more narrow sense, is to be the focus of the commission.

My client's concerns about the building of the Hindmarsh Island Bridge are more to do with matters outside the terms of reference. It is for that reason...
that he is not sure at the present time as to what
evidence he can usefully give to the commission. It may
well be that he elects to give evidence about those
matters, that is, the matters of interest to him to the
Commonwealth inquiry that has been announced.

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

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

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

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

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

MR BOURNE: My client's attitude towards allegations
of that sort will have to be formulated in response to
the material which is available which suggests that he
has knowledge about each of those things. At the
present time, I have a number of assumptions about those
things, but not full disclosure, and it seems that the
other parties are complaining of lack of full disclosure as to exactly what those allegations are.
COMSR: This is not a trial though. This is an inquiry into -
INTERJECTOR: It is a monkey show.
COMSR: Just a moment. This is a preliminary matter on a legal issue and I would expect people in the hearing to be quiet while these matters are raised so that I can follow the arguments that are being put.
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MR BOURNE: My argument is in order to advise my client and obtain instructions and prepare for the hearing with respect to, in particular, the circumstances of the fabrication. I need to know what are and are not. Necessarily, today, I will need to know to enable me to prepare the matter the time and times of the alleged fabrication, who was present and what is alleged was said. Once I have the material, I will be in a position to obtain his instructions in relation to that particular Term of Reference.

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

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

INTERJECTOR: No-one knows.

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

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

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

COMSR: Are there any other counsel who wishes
to address any submissions as to the Terms of Reference?

Counsel assisting.

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

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

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

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

I go now to clause one and ‘women's business' first of all. ‘Women's business' in clause one is clearly that which exists in appendix 2, and, as I understand it, is further explained in appendix 3 in the sealed
envelopes. Because, Commissioner, the definition of
`women's business' in the final paragraph of the Terms
of Reference picks up the description of `women's
business' in the report of Professor Cheryl Saunders
dated July 1994 which, in turn, picks up the description
from the report of Dr Deane Fergie dated June 1994 which
will eventually be the subject of evidence. The
preamble, namely clause 2, also makes it clear.

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

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

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

INTERJECTOR: That's right, not you.
COMSR: I would ask that people sitting in the
hearing room not make comments because it interrupts the
flow of an argument and makes it difficult for me to
follow the course of the argument, so I ask of you the
courtesy that you not interrupt while counsel's
addressing what is, after all, a legal argument to me.
MR SMITH: I make the -
INTERJECTOR: It's not a legal argument.
COMSR: Just a moment.
MR SMITH: I make the point that the envelopes
themselves are marked `To be read by women only', and I
wouldn't be seeking to read them myself at any stage.
I point out also in relation to this phrase in the
Terms of Reference that the privilege of knowing what
was in the envelopes has been extended, as the evidence
will establish, to: Dr Deane Fergie in June 1994,
Professor Cheryl Saunders in June 1949 and the
Minister's assistant Susan Kee in July 1994. Further,
it appears from the reports to hand and in particular
the report of Professor Saunders, that on 20 June at
Goolwa, the secret women's business was extended to some
of the younger women in the group of 35 gathered at a
meeting on that date.
I indicate that in relation to the secret appendices, the Royal Commission has, by letter late
last week, requested that my learned friend Miss Layton
QC obtain instructions to disclose the contents of the
confidential envelopes to certain of the Ngarrindjeri
women represented here.
I move to the question then in relation to women's
business. What does the mention of that in the Terms of
Reference mean in terms of what evidence will need to be
the subject of this inquiry? It's my submission that
the scope and presentation of evidence as to this Term
of Reference, in so far as it relates to women's
business, is really demonstrated by the two definition
sections in the Terms of Reference themselves. To
determine whether women's business is fabricated, it's
necessary for the Commission to examine women's business
within the Aboriginal tradition of the Ngarrindjeri
people. The Aboriginal tradition is defined in the
Terms of Reference as being:
'The body of traditions, observances, customs and
beliefs of Aborigines generally or of a particular
community or group of Aborigines and includes any such
traditions, observances, customs or beliefs relating to
particular persons, areas, objects or relationships.'
So, therefore, this inquiry, in looking at the
question of women's business, will necessarily look at
the Aboriginal biological, the Ngarrindjeri history, 
anthropological, archaeological history. The inquiry 
will also necessarily examine the process by which 
Aboriginal communities became involved in the Hindmarsh 
Island development, including the construction of the 
bridge. It will be the process by which Aboriginal 
people became involved in the construction of the bridge 
which will be the Commission's focus, not, of course, 
whether the bridge should be build, the economic 
considerations, conservation considerations, et cetera.

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

INTERJECTOR:  'Wasn't `to fabricate'.

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

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

If women's business is a fabrication or any aspect
of it is a fabrication, it is clear that in coming to
that conclusion, you will have explored all three of
those matters in any event; that is, you will have
looked at the circumstances relating to the issue, you
will have looked at the extent of it, you will have
heard details about the purpose of it. My submission to
you there is that the way in which that is phrased in
clause one, you will be addressing your mind to what the
Government wish you to report on.

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

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

The second matter is the Federal Court action. The
Federal Court action between Thomas, Wendy and Andrew
Chapman v the Federal Minister & Ors cannot be
prejudiced by this inquiry. Again, that action
concerns, if I could broadly describe it, the
administrative efficacy of the Minister's decision, or
the exercise of power by the Minister under the
Aboriginal and Torres Strait Islanders Act 1984. This
inquiry is not concerned with and cannot be concerned
with how the Minister exercised this power and whether
or not what he did was properly reviewable.
Again, the subject matter of and the circumstances
leading up to that declaration will and can be the
subject of this inquiry.
The third matter which needs care and sensitivity in
this inquiry is the question of racial discrimination
and the Racial Discrimination Act of the Commonwealth,
1975. It is my submission to you that the Terms of
Reference direct to you that sort of problem, and
clearly any compulsion on the Ngarrindjeri Aboriginals
to divulge, in contravention of Aboriginal tradition,
their beliefs would have the potential to breach the
Racial Discrimination Act. Therefore, you, Madam
Commissioner, will take care in this sensitive area.
Fourthly, confidential matters of Aboriginal
tradition, subject to the terms of authorisation of the
Minister under s.35 of the Aboriginal Heritage Act, the
South Australian Act, the following matters will, I
submit, need some care in this inquiry. If there is
evidence that there may be a divulgence which amounts to
a contravention of Aboriginal tradition, then the
Commissioner will take such evidence in camera and the
evidence itself will be prohibited from publication.
Nextly, more specifically, if there is evidence
which is or is claimed to be secret women's business,
then, additionally, the hearing room can be cleared of
males.
Sixthly, there may be other categories of evidence
which may give rise to concern and require the taking of
such steps so as to protect confidentiality.
They are my submissions.
COMSR: I don't know if there are any further
submissions on that point? I wouldn't propose to give
my ruling on the meaning of the Terms of Reference this morning.

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

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

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

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

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

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

MR SMITH: I will confirm there will be an opening, a general opening statement, on Thursday morning.

MS LAYTON: To be followed by evidence on Thursday?

MR SMITH: Yes.

MS LAYTON: That is the problem. That is exactly the problem I'm heralding. There can't be an opening on the same day that evidence is adduced. One of problems will be that the opening will disclose certain matters on which we will immediately not necessarily be in a position to be able to cross-examine on. We herald that.

COMSR: It doesn't follow that everybody can cross-examine at length. Cross-examination is a matter for the discretion of the Commissioner. However, as I say, it's always up to counsel to make a submission to me concerning any problems that they're faced with.

MS LAYTON: If I can herald the possible problem.

If there is to be an opening on the Thursday for the first time and to be followed immediately by evidence, there may well be a problem so far as my client is concerned.

The second aspect I wonder if I could address you briefly on, and it arose in the context of the other people who went before me. There was the analogy as to whether it was a criminal matter or whether it was an inquiry. The submission I wish to make on that is that it's a matter of natural justice as an administrative body, or a body that is dealing with an inquiry under letters patent. It is quite clearly the need for those who may be involved to know what it is that they may have to face. It is not a matter of particulars in a criminal matter, but to enable those that face being involved to know what they're meant to meet, and that is the purpose.

COMSR: Perhaps you might enlarge upon that argument when we come to consider the terms of the leave to appear and the conditions of the leave to appear.
MS LAYTON: Certainly. Thank you.
COMSR: As I indicated, I don't propose at this stage to give any ruling on the question of the meaning of the Terms of Reference, but I propose now to move onto the next matter for counsel assisting, the issue of confidentiality or the terms of leave to appear.
MR SMITH: To the extent that people have not addressed those matters or they are unsatisfied with some indications of what safeguards the Commission is going to take, that can be addressed, but it may be that no-one has anything to say about that, bearing in mind what is being said.
COMSR: I will invite counsel if they have submissions on the issues of confidentiality and privacy to make any submissions on that, to do so.
MS LAYTON: I seem to be the only one standing on my feet at this point. I will see if there are any other advances, as it were.
COMSR: I'm more particularly interested with regard to the Terms of Reference.
MS LAYTON: That is the confidentiality with regard to the Terms of Reference. The two matters that I wish to raise relate to: firstly, s.35; and, secondly, confidentiality in general.
With regard to s.35, the ALRM is aware that an authorisation has already been given by the Minister to yourself and those assisting you to be able to receive information in a way that without that authorisation it would otherwise be an infringement of the State Aboriginal Heritage Act.
If I could remind you, Madam Commissioner, of what those terms are. It says: `Except as authorised or required by this Act, a person must not, in contravention of Aboriginal tradition' -
and I underscore those words - `Divulge information in
relation to an Aboriginal site or Aboriginal tradition.'
The only way in which any information can be given by
any person which would contravene Aboriginal tradition
and the giving of evidence in accordance with Aboriginal
tradition is if the Minister has given an appropriate
authorisation.

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

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

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

The second aspect is connected with that, but can
stand alone from that. That is: the extent to which
information and the giving of it may, in fact,
contravene Aboriginal tradition. Some of the methods
that have been spoken of - namely, if `women's business'
is to be the subject of any evidence - it's suggested
that the Commission could be cleared of any males.
That, of itself, is not the only aspect. Males are one
thing, appropriate women - be they white or Aboriginal -
is another. They are all related to the question of
what information and how information can be given that
is not in contravention of Aboriginal tradition.
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This would have to be on a case-by-case basis. In other words, we herald what the problem is and that information and the details that might be sought might have to be held on an individual basis each time as to the manner in which information should or should not be given. So those are the two matters that I indicate.

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

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

Section 35 was put there for the very good purpose that it was meant to maintain those matters which were traditional to Aboriginal people, for them alone, and not to be divulged inappropriately. We would submit that there is a very strong argument which will be put to the Supreme Court about that, and we ask you to bear that in mind, having regard to the challenge that we have made with regard to the section 35 authorisation. Those are our submissions that we wish to make with regard to confidentiality.

MS PYKE: It would be my submission that it would be inappropriate to make any order in general about the nature in which confidential information is to be dealt with. Dr Fergie, of course, occupies a particular position in these proceedings. She was an anthropologist who was commissioned by the Aboriginal Legal Rights Movement to assist in the preparation of a
report for the section 10 declaration. I am not in a position yet to obtain full instructions about the manner in which she went about her task or the manner in which confidential information was imparted to her.

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

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

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

MR ABBOTT: We have a few brief submissions on the issue of confidentiality. May I make one observation about my learned friend Ms Layton, who acts for the Aboriginal Legal Rights Movement? She said, about confidential material, it is not just a question of ’Women' but ’Appropriate women'. If, by that, it is intended to mean that my clients should be excluded from seeing confidential material, when they are the very people whom my learned friend says should come forward with their allegations, it places my clients in a very invidious position, in that they are forced to give
evidence yet not allowed to see the material in respect
of which the claim of `Women's business' is made.

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

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

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

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

What I have in mind is this: There is obviously
considerable concern in the community and obviously very
great interest, as evidenced by the number of people
here today, in the workings of this commission. I am
concerned that witness statements are disseminated in
written form beyond counsel and that they escape from
counsel and come into the community at large.

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

‘Except for the purposes of taking instructions there
... until a witness has confirmed it in evidence’

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

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

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

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

The other matter that I want to raise is the issue
of the names of deceased Aboriginal persons. It is our
submission that a way needs to be formulated so that
those names are not mentioned at all and there should be
some guideline promulgated by you, first of all,
directing all participants not to mention the names of
any deceased person, but to allow for a way in which one
can ascertain who is being spoken of so that the
transcript makes sense.
    Normally this will be readily achieved by counsel
assisting making it clear at the beginning of a passage
of evidence, in a way other than speaking about it, of
who it is the evidence is concerned. But that is a
matter that needs to be addressed and we ask that it be
addressed.

MS LAYTON: If I could respond to Mr Abbott about
the secret or the confidential annexures? The letter
that was sent to me - and I understand letters have not
only been sent to me but also other persons - but the
one that was sent to me asked if I could get
instructions on divulging matters or the secret
envelopes to certain persons.
    If I could indicate that it is not for me to get
instructions from anybody. I have only given an
undertaking in the Supreme Court that those documents
will remain secure. They are not matters upon which I
can do anything other than that. The information that
has been sent to me, I will pass on to the relevant
persons.
    It is not for me to get instructions from anybody on
that. There is no question of me doing so, or talking
on behalf of those persons. I speak on behalf of the
Aboriginal Legal Rights Movement only. I do not speak
on behalf Aboriginal women or a subgroup of them, and
neither does Mr Collett, who also represents the ALRM.
    My friend mentioned a boycott. I do not know if he
was deliberately using that word. My recollection of
what Ms Claire O'Connor indicated was that the women
sought not to be represented at the hearing. I had not
heard that there was to be any inference drawn other
than that they seek not to be represented.
COMSR: Any other counsel wish to be heard?

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

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

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

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

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

MR ABBOTT: In my submission, that could easily be achieved and was achieved. We gave written undertakings that, if required by counsel assisting, we would do so and, for my part, we are prepared to give, as it were, a blanket undertaking that on any occasion on which we are
required by counsel assisting to maintain the
confidentiality in the way in which I have spoken, we
will do so.
MR SMITH: If there are no other submissions
touching on that third item, I request that we adjourn
the commission until 10 or 10.15 on Thursday, 27 July.
COMSR: There is still the issue of the terms
under which counsel have leave to appear. Are you ready
to pursue that matter?
MR SMITH: I envisage, in light of the submissions
that have been made so far, that you will receive
submissions from a number of the counsel saying that
they are not in the position to indicate the degree to
which they intend to participate until they receive some
detail of the alleged involvement of their clients in
the inquiry. But perhaps you could ask for submissions
about that.
COMSR: I take it there would be a number of
counsel in that situation. Without asking you to go
into any detail, I see a considerable number of counsel
have indicated they would be in that position. So what
you are suggesting is that I defer a ruling on that
matter until after the opening? Is that what you are
suggesting?
MR SMITH: Yes.
COMSR: In the circumstances, it would appear
that there are such a number of counsel who have
indicated that they would not be in a position really to
address me on that issue, that it looks to be the
sensible course to follow then to adjourn that
particular matter. I do not know if any counsel wish to
make any submission to the contrary, but I do it simply
for the sake of convenience. I have noticed quite a
number of counsel indicate that they are not in the
position to make an appropriate submission at this time.
MR MEYER: If it assists, as you are aware, I
appear for the Chapmans. I do not know what the
attitude of counsel assisting is, but my position for my
clients is that we have an interest in this matter from
the beginning to the end, as we have had all the way in
many other proceedings, and we would seek that there be
no limitation on our rights to cross-examine any witness
in any way at all.
Our position will not change, whatever particulars
are provided to whichever counsel may appear. I can
enlarge on that submission or, if counsel assisting says
that he has not got any objection to that course, your
Honour might be in a position to make a ruling.
MR SMITH: I suggest that we leave this question
until the resumption.
COMSR: Yes. It seems most convenient to deal
with them all at once. Your attitude and your comments
have been noted in respect of the parties that you
represent. Under the circumstances, I will adjourn
until Thursday, at 10 a.m.
MR SMITH: Some people have indicated that 10.15 is
a convenient time, but we need to set a time that will
involve getting the evidence through efficiently.
COMSR: I know it might be more convenient to
start at 10.15, but I think realistically we have got to
look at a starting time of 10 a.m., given the time
constraints within which the commission is working.
ADJOURNED 12.05 P.M. TO THURSDAY, 27 JULY 1995 AT 10 A.M.
RESUMING 10.05 A.M.

MR TILMOUTH: May it please the Commission. As a formal matter, I seek leave to appear with Mr Kenny for the men that I mentioned in the opening day of this Commission.

COMSR: I will give you leave at present. Later, I'll be requiring some more detail from all counsel as to the parameters of special interest which go to matters of the extent of cross-examination and other matters.

MS LAYTON: Could I mention another formal matter. I appear with Mr Bradshaw in lieu of Mr Collett for the ALRM.

MR SMITH: If I could set the programme, and if people have a special matter they wish to raise. The programme for today is that if you will rule on the Terms of References, I will then make a short opening statement. Then, if it's convenient, you will hear leave questions relating to the extent of rights of participation in cross-examination of witnesses.

I would then be asking that you adjourn for a short period before any evidence commences, during which time written undertakings as to confidentiality will be handed out to counsel and their instructing solicitors to sign and/or to peruse and sign, and also the terms of the recent s.35 authority from the Minister.

I propose the Commission will then resume to hear any argument as to the consequences of the terms of the s.35 authority. Subject to all of that, the evidence will commence and it will commence with a short eight minute film of the Ngarrindjeri, if I can.

MR ABBOTT: The report of a curse placed on the
Royal Commission, this hearing room, might, if true,
demonstrate the lengths to which those opposed to this
Royal Commission will go to.
COMSR: Wait a minute. What is the purpose of
this?
MR ABBOTT: I will tell your Honour what the purpose
of this is. The purpose of this is that we have
received information that the ALRM and other associated
parties -
COMSR: That is not - I mean, I don't want you
to recite the history of it. If are you making some
application?
MR ABBOTT: Yes, I am.
COMSR: Well, could you explain, without going
into detail, what is to be the nature of the
application.
MR ABBOTT: The application that I'm seeking and
which I propose to make is that you, Madam Commissioner,
take steps to assure my clients and others that the
acclaimed curse is of no effect, will not deflect you
from the investigation of these matters, and that you
will afford the appropriate protection to all witnesses,
and in particular my clients for whom I act, and for the
many other women who have come forward and asked us to -
have given us information. I am concerned that,
according to the newspaper reports, the Doreen
Kartinyeri's camp is using the pretext of -
INTERJECTOR: Disgusting.
MR ABBOTT: Have got you to look at -
COMSR: Just a moment.
INTERJECTOR: This is a joke.
MR ABBOTT: I want to say something about the
continuing interjections we are getting.
COMSR: I appreciate the nature of that problem.
But what you're seeking, as I understand it, is an
assurance that, what, in fact, there was no curse?
MR ABBOTT: Well, we do not know what happened. I'm
concerned that, according to the newspaper reports,
apparently in the pretext of getting you to look at the law stick and a painting, the curse was allegedly placed on this room. If that is true, if it's true, I say that there was an advantage taken of a courtesy extended by you on that basis, to take steps with the intention of threatening and intimidating my clients.

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

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

MS LAYTON: I object.

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

MR ABBOTT: May I put this position. We were excluded, first of all, all men then all women, or other than Ngarrindjeri women, so it was said, when those whom Miss O'Connor represented sought and received from you the courtesy of you viewing or doing something in relation to some objects. Whatever jurisdiction then existed for that occasion being secret, has, in view of this morning's newspaper report, now disappeared. My clients need to know exactly what did happen as to that so we can assure our clients that they have nothing to fear. If I cannot be told exactly what went on, then Mrs Shaw, my junior counsel, and Miss Freeman, my instructing solicitor, can and should be told.
We want your assurance, Madam Commissioner, and for you to give assurance, as I said, not merely to the five women for whom we appeared but for many other in the Ngarrindjeri Aboriginal community who, I must say, do have concerns at the pressure and intimidation which is currently being placed on them. I haven't raised this topic before because I was hoping to diffuse the issue. Today's newspaper report raises it fairly and squarely and, as I've said, this campaign which appears to -

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

MR ABBOTT: It's more than that. It is more than that. I want to tell your Honour a few more things. It's not just that, it seems to me that -

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

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

COMSR: You are talking about Miss O'Connor?

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

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

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

MR ABBOTT: Yes, and by you Madam Commissioner. I want to say this: We understand that a Central Australian woman from the Pitjantajtjara lands was amongst the group. Although the group was represented
to you as being Ngarrindjeri, was amongst the group whom
you saw. If that is so, it raises grave concerns.
COMSR: The short answer to all of this, without
having to go into detail, is, first of all, to see what
steps can be taken to get the assurance that you're
seeking. If that should prove to be necessary and in
the event that there is a satisfactory assurance, I take
it that that would deal with the immediate problem?
MR ABBOTT: That would certainly deal with the
immediate problem. The other matter is the abuse and
continued interjections which have been coming from the
participants here. I apprehend that you, Madam
Commissioner, have not heard all of it because you are
seated some further distance away from where we are. I
can tell you that last Monday, when I was addressing
you, there was almost continual interjections by a
number of persons and I'm afraid that you only heard a
bit of the almost continual barrage of abuse and comment
that was conducted whilst I was on my feet.
COMSR: I do understand that in the position I'm
seated it is not possible for me to hear as clearly as
where you are. Of course, one cannot permit continued
interjections of that sort to go on. In the event that
that should be the case, well, then, of course, I will
have to consider what steps should be taken.
MR ABBOTT: I would ask that you, Madam
Commissioner, make it clear that any interjector who
continues will be excluded; and, more particularly, that
any person who, directly or indirectly, attempts to
threaten or intimidate any proposed witnesses, not just
my clients, will be subject to proceedings for contempt
in that case in this Royal Commission.
I submit that it's appropriate, given the report in
the Advertiser this morning, that you publicly offer all
witnesses, who may be minded to come before you, the
protection and comfort which is within your power to
give as a means of allaying any fears that those persons
may have in coming to the Royal Commission and giving
evidence. They will be subject to, I say it fairly and
plainly, a campaign of vilification and abuse that has
continued almost from the day my clients made their
views about this so-called secret women's business first
known.
The other matter I should mention is that the
campaign of vilification -
COMSR: Now, I know you categorise it as such.
No doubt there are specific instances which you rely on
for that, but -
MR ABBOTT: I'm not going to call them that. I want
to say something else about me and the lawyers who act
for my clients because of the rumours that are
circulating. I want to make it -
MR TILMOUTH: I object. If we are going to have a
Royal Commission into rumours, we will be here for
months.
MR ABBOTT: This is not a Royal Commission about
rumours.
MR TILMOUTH: Mr Abbott has talked about things that
there is no evidence about whatsoever. You made a
statement the other day with respect to what happened in
this room. There is no reason to believe, on the face
of what Mr Abbott is saying, that you can't deal with
the matter. What he is saying about the alleged
threats, and so on, is merely belittling Aboriginal
beliefs and religion and trying to create some kind of
an atmosphere of a witch doctor mentality and -
COMSR: Just one moment. If there is going to
be any further discussion of this nature, I would
propose that it not be before the public. But, at this
stage, I take it that whatever the basis of the
apprehension which you say that your clients feel, be it
ture or otherwise, that there is a way of dealing with
it.
MR ABBOTT: I would hope so.
COMSR: I don't think we need to take it any
further than that at this stage, because it may be that
we are able to, without ruling in any way on the merits
of what you had to say, Mr Abbott, it may be that we are
able to allay the fears, justified or otherwise, in that
respect.

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

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

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

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

MR ABBOTT: I am happy to do so.

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

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

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

COMSR: Yes. Mr Smith -

MR BOURNE: Before Mr Smith rises, I have a
preliminary matter, and a less controversial matter so
far as my client, Mr Milera, is concerned. However, it
is a matter of substance. My instructions today are to
indicate that my client no longer seeks to be
represented in this Commission; that is, Doug Milera.
You might recall that on the two occasions on which I
have previously spoken in this Commission, I
foreshadowed that my application for leave to appear on
his behalf was contingent upon material which would be
obtained and upon which I would give him advice. My
instructions are to put to the Commission the reasons
why Mr Milera has so instructed me and then to withdraw.
I seek the opportunity of doing that now.
COMSR: Do I need to know anything more than
that in that sense?
MR BOURNE: You do, with respect. As council
assisting reminded us on Monday, this is an inquiry and
not a trial. No doubt whether my client is here or not,
with council assisting, any person with an interest in
the matter may attempt to make use of material which
directory affects my client. He wants to have on the
record the reasons why he either maintains or rejects
information which might be put to this Commission in his
absence. He only seeks to do that in a very general
way. However, if that is not done and that is not put
on record here, undoubtedly there will be speculation
and innuendo and media reporting on a whole range of
things which may be said about that. It is not fair to
the Commission nor to those with an interest in the
outcome of the inquiry for that to be on trial with
innuendo, rumour and media speculation rather than the
reasons generally as they are to be placed on the
record.
COMSR: It is not a trial of any sort by rumour
or speculation. This is an inquiry into an attempt to
gather the facts relating to the matters that are within
the ambit of the Terms of Reference.
MR BOURNE: Quite so. In respect of that, my
client, before making a final decision, had hoped to
have this fully disclosed and have access to the
materials directly affecting him and the part that he
might play in this inquiry - I include in that media
tapes of interviews with him - so that he can be fully
informed and to state clearly to the Commission his
reasons for the decision that he has reached.
I regret that this has not occurred, that we have
not got this information, despite requests and calls for
the material comprising, in particular, media tapes of
interviews and discussions. But my client is not
prepared to wait until that occurs before he makes the
decision and commits himself to the course that he is
concerned the Commission will take.
Mr Milera is concerned that before there is an
opening statement and before evidence commences, his
position is made clear and his reasons, as I say, put on
the record.
In that context, I ask to put to you, by way of my
client's statement to the Commission, his reasons for
that decision -
MR SMITH: Commissioner, I object to this course
being taken now. The appropriate course is for my
learned friend to speak to me about such matters and we
will resolve it. Making a statement such as this in the
Commission at this stage is holding up the proceedings.
The Commission is going to go on for a number of weeks.
My learned friend, Mr Bourne, and myself ought to
discuss this matter to find out why it is that Mr Milera
is not willing to assist the Commission, and I will see
if I can address those matters. A statement such as
this now is quite inappropriate.
MR BOURNE: I can’t discuss any further matters
after today with Mr Smith or anyone. My instructions
are withdrawn. My instructions, but for putting my
client's reasons to you, are terminated. After that, I
can do no more. If by some media process, as one would
readily accept in the current climate, there is
speculation and innuendo about what the matter might
have been, that is regrettable, in my submission, and I
seek to make the statement on my client's behalf now.

COMSR: You sought leave to withdraw.

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

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

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

`I have been -`

MR MEYER: I object.

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

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

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

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

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

MR BOURNE: With the considerable media interest in the matter, there is no doubt that my client won't be able to contain what will happen from here as far as that is concerned. That means that the trial by media, which I suggest should be avoided, is going to take a
CJ 3A

course of its own.

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

MR BOURNE: Not within the Commission.

COMSR: That is the point.

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

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

MR BOURNE: I don't have those instructions.

COMSR: You have leave to withdraw then.

MR BOURNE: If the Commission pleases.

MR BOURNE WITHDRAWS

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

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

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

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

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

THE COMMISSIONER’S TERMS OF REFERENCE

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

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

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

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

PREJUDICE AND CONFIDENTIALITY

In relation to the powers contained in sections 6 and
16(a) of the Royal Commissions Act, there are specific
provisions in clause 3 of the Terms of Reference
relating to prejudice, confidentiality and
non-disclosure, and provision that the inquiry, or parts
thereof, may be conducted in private and to report, in
part, by way of confidential report or to report by way of general description or summaries.

3(a) This clause requires of the Commission that it avoid prejudicing the proceedings currently before the Federal Appeals Court in respect of a determination made on 12 May 1994 by the Minister pursuant to s.10 of the Aboriginal and Torres Strait Islanders Protection Act 1984 and varied on 9 June 1994.

CONTINUED
3(b) This clause requires the Commission to protect any
information that could properly be considered as
confidential, for whatever reason, be it because of
Aboriginal tradition or for some other sufficient
reason.

3(c) This clause forbids the publication to anyone,
except as authorised by the State Minister of
Aboriginal Affairs of any matters relating to
Aboriginal sites, and traditions, where such
publication contravenes Aboriginal tradition.

The definition clauses identify the meaning to be
attached to the expressions ‘Aboriginal tradition’ and
‘women's business’. It is in general considered
desirable that the proceedings of the Commission be
conducted in public, without restriction on publication.
However, the subject matter of this inquiry, and clause
3 of the Terms of Reference, underline the necessity to
have regard to confidentiality. Substantial parts of
the evidence, unless they are already in the public
arena, may need to be heard in private to protect
confidentiality, and considerable material may need to
be suppressed from publication. Furthermore, as the
issue of whether or not the secret ‘women's business'
was a fabrication remains to be determined, the
Commission will treat any information or evidence as to
details of such secret ‘women's business' as secret and
requiring special provision for confidentiality.

In order to protect against an inadvertent
publication of material which might contravene clause 3,
I propose to make an order, suppressing from
publication, until further order, anything which the
commissioner determines:

(a) May prejudice or tend to prejudice any judicial
proceedings relating to the declaration made by the
Minister of Aboriginal and Torres Strait Islander
Affairs of the Commonwealth Government.

(b) May destroy or tend to destroy the confidentiality
of information which the Commissioner determines to
be information which could properly be regarded as
confidential pursuant to Aboriginal tradition or
otherwise.
(c) May contravene or tend to contravene Section 35 of
the Aboriginal Heritage Act.
(d) May reveal or tend to reveal any detail of secret
`women's business'.
I will hear submissions from the parties as to the
making of this order. I do not propose to hear those
submissions now, but there are copies of my ruling which
will be handed out to counsel. I propose to hear
submissions tomorrow, if that is a convenient time. I
think you have in mind, Mr Smith, that you would now
proceed to your opening.

MR SMITH: Yes, make an opening statement to the
extent that I can. As a preliminary matter, on behalf
of the Commission, I acknowledge that this inquiry,
which relates to Ngarrindjeri people, is being held on
Kurna lands, and this inquiry acknowledges the fact of
that in the presence of an Elder of the Kurna people, Mr
Lewis O'Brien.
On behalf of the Commission, I would like to
emphasize, in case this object has been lost sight of in
this third day, that the task of the Commission is to
adduce all relevant evidence without fear, favour or
bias. It therefore urges all parties interested to come
forward on that understanding.
At this stage the Commission can only lead evidence
that it, itself, unearths, and what interested parties
bring forward. Again, the Commission assures all
parties, and in particular Aboriginal interests, that it
will take all reasonable steps to ensure secrecy and
confidences.
On the last occasion that the Commission sat, there
was much said about allegations and particulars. I
indicate to counsel that the allegations spoken of in
the Terms of Reference are those ventilated in the
electronic and print media in the year or so since the
declaration by the Federal Minister. Most of that
material is available to all interested parties through
the Commission now: That is, newsprint items and, in
particular, copies of Channel 10 videos. So, in
connection with allegations, I invite the parties that
are represented here at the bar table to take advantage
of that facility.

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

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

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

I refer my learned friends at the bar table, who on
the last occasion appeared to think I had some sort of
obligation in this area, to the 1982 edition of `Royal
Commissions and Boards of Inquiry' by Leonard Arthur
Hallet at p.217, where the learned author recommends
that counsel assisting, to use his words, should do
little more than generally outline the course it expects
the inquiry might take. I propose to follow that
course. And I now tell the Commission and those here
that the evidence, as I approximately see it at this
eyear stage, will be in three stages.
Stage one will constitute evidence from the South Australian Museum. This evidence will not only deal with the historical and anthropological evidence as to ‘women’s business’ general, but it will also touch upon Aboriginal traditions, heritage and culture related to the Ngarrindjeri people.

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

Stage two of the evidence falls into two broad parts. Firstly, evidence as to the history of Aboriginal involvement in the proposed development on Hindmarsh Island, including the bridge; and the second part, the emergence of significant disagreement between the Ngarrindjeri people as to the secret ‘women’s business’.

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

The evidence will indicate that, in this period up to 9 July 1994, there were experts’ reports obtained and environmental impact statements made, and, to some extent, consultation with Aboriginals and Aboriginal
The reports of an expert nature came from Dr Vanessa Edmonds, an archaeologist; Dr Rob Lucas, anthropologist; Dr Neale Draper, an archaeologist. The reports will be tendered in the course of evidence, together with the environmental impact statements.

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

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

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

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

The Commission again encourages any person who was present at those meetings to give evidence to the Commission. The Commission has in place safeguards to protect and maintain confidentiality of any such evidence. If necessary, the disclosure of any such information or evidence requiring it, may be limited to
women only in a private hearing. There may be other
conditions which may be appropriate to giving of
evidence at this stage and the Commission will give
serious consideration to implementing proper measures by
which this evidence can be advanced.

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

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

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

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

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

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

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

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

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

Although, the different groups have been permitted to appear, counsel have been given leave to appear before this Commission, that was in order to promote the efficiency of the inquiry, having regard to the time limits within which we are working. It is still necessary for me to have some idea, in respect of each other individual person or each group, the extent of the interest of that group. Therefore, I will be asking counsel to consider those matters after we have the
adjournment so that you are in a position to assist me
in that respect also. Are counsel agreed that half an
hour would be a sufficient time for this adjournment to
enable you to consider the documents?
MR TILMOUTH: Can I be bold enough to suggest quarter
to 12? I have a feeling that, as things stand, time
might blow out and it might be better just to be a bit
cautious on that.
COMSR: I notice some people assenting. If it
is felt necessary, yes.
MR TILMOUTH: Better to be safe and sure, in other
words.
COMSR: I would sooner be in the position of
being fully informed by each counsel as to the limits of
their representation than to have to adjourn again. We
will adjourn until quarter to 12.
ADJOURNED 10.55 A.M.
RESUMING 11.50 A.M.
MS LAYTON: I have indicated just briefly to my
friend, the assisting counsel, that we haven't been able
to take the full instructions that we need, particularly
with regard to the Section 35 declaration. I wonder if
the Commission would grant us the indulgence until after
lunch, because we have instructions to get? I
understand other people might share that view.
COMSR: I take it that other counsel join in
that application?
MR ABBOTT: No, we do not. We want to get on with it.
MS LAYTON: We are not being obstructive in the way
my friend seems to suggest. He can't help but add
pejorative terms to everything he does.
COMSR: Perhaps if I could deal with one matter
first and get this out of the way. Have all counsel
signed the applications as to confidentiality?
MS LAYTON: No.
MR TILMOUTH: We didn't get to it. It was nothing
more than that.
COMSR: I take it you are in the same situation?
MR TILMOUTH: Yes, I am. I should have expressly
    said. I wanted to say we just haven't thought about the
    undertakings. The fact that we haven't signed them
    means nothing more than that. We were just too busy
    thinking about other things.
COMSR: I am as anxious as anyone to get a start
    on the hearing, but clearly if the situation is that
    counsel have not been able to properly consider the
    implications of the material that has been placed before
    them, it would be more advantageous to take the
    additional hour that is involved for the adjournment,
    rather than matters be prolonged while individual
    counsel have got to delay matters. Would that be the
    extent of any adjournment that is required for this
    purpose?
MS LAYTON: I would hope so. I am trying to get
    things done as speedily as I can.
COMSR: Although I sympathise with your view, Mr
    Abbott, that it would be helpful if we could commence
    the evidence, I feel that in the circumstances I should
    allow the additional time and I propose to adjourn until
    after lunch.
MR SMITH: Is that 2 o'clock?
COMSR: I will make it 2.15 in the
    circumstances.
MR BOURNE ENTERS HEARING ROOM
MR BOURNE: Before you adjourn, I am mindful of the
    fact that I have been granted and had leave to withdraw
    and have withdrawn, and my client has withdrawn from
    this Commission. I am mindful of a ruling which you
    gave, although I don't have the transcript before me, in
    regard to the media respecting the rights and the
    privacy of the persons involved in the inquiry,
    potential witnesses.
    My client of course remains, I suppose, a potential
    witness in the matter, and I do not know whether a
    decision might be made to compel or attempt to compel
    him to give evidence in the matter. I would ask you to
remind the media of the ruling which you gave and
expressly to rule that my client not be approached by
the media and that his wish for privacy, and to add
nothing to what has already been said by him on his
behalf, be respected.
COMSR: I do not know that I have so much as
made a ruling as said that I would expect the media not
to approach any witnesses within the precincts of the
building because it might intimidate the witnesses. I
am not sure that what I said amounted to a ruling on the
matter.
MR BOURNE: Perhaps it would be sufficient at this
stage if I ask you to remind the media of that
expression by you in opening the Commission.
COMSR: I can certainly do that. Any members of
the media present, you have heard that Mr Milera,
through his counsel, has indicated that he personally
does not wish to say anything to the media. In the
circumstances, I can only ask that the media to respect
his wishes.
MR MEYER: The difficulty that arises with that is
that, as I came back from the adjournment, I was
approached by the media and invited to read a statement
of Doug Milera, which starts off with the word 'I'. It
is headed 'Stanley and Partners' on the piece of paper,
but it is a direct statement which has apparently been
given by Mr Milera to the press.
COMSR: I do not know how it might have found
its way into the hands of the press.
MR MEYER: Nor do I, but it appears that what is
happening is it is a cake-and-eat-too situation, 'I will
give it to the media, but I don't want to talk.
COMSR: Be that as it may, I have done the best
I can to encourage the media to respect the expressed
wish by Mr Milera not to be approached by any members of
the media.
ADJOURNED 11.56 A.M.
RESUMING 2.20 P.M.

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

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

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

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

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

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

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

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

Clearly then just at that point the Royal Commission in its preamble is indicating that it was designed to investigate the allegations that secret women's business was a fabrication, which, in turn, leads to the Terms of Reference in para. 1 asking the Commission to inquire as to whether the women's business, or any aspect of it, was a fabrication.
Our submission is that the very starting point of
this Commission must be; what are the allegations of
fabrication of women's business which set the parameters
of the inquiry of the Royal Commission? And we submit
that the Royal Commission cannot commence the taking of
any evidence without identifying what those allegations
are and indicating what evidence is to be adduced about
those allegations. And, in particular, supplying
statements from the persons who make the allegations of
fabrication in the usual way that is done in Royal
Commissions. Namely, Royal Commissions do not usually
commence the giving of evidence without statements being
provided. And in this Royal Commission we say that the
statements must be related to what are the allegations
of fabrication.

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

Also, counsel assisting has indicated that the
allegations with regard to, I presume, secret women's
business are those ventilated in the electronic media.
And what he has done is he has invited counsel to look
at the material which is available in order to see what
it is that those allegations are, but we haven't yet
seen it. There have been some documents that have been
provided, which stand roughly two and a half inches
high, which are alleged to be the electronic media. We
don't know, at this stage, whether that is the entire
media, but we do know, from looking at it cursorily,
that it contains extracts only and certainly does not
pretend to be a complete record of what is in the
electronic media. But, in any event, before any of us
have had an opportunity of looking at that, the evidence
is meant to commence.
Further, he added in his outline that the allegations that are being made are those set out in the judgment of Debelle J at pp.3 and 4 which was delivered on 26 July 1995. And that, as you, Commissioner, would be aware, related to an appeal that was taken by ALRM with regard to the interlocutory injunction.

Looking at the matters that are set forth in paras.3 and 4 of his Honour's reasons, the first overt matter is that his Honour didn't have before him all of the media. He was just selecting aspects of it. And, in particular, he refers only to three named media publications together with two unnamed. And, by that, I mean undated publications. And we know, from the two and a half inches of material, that that is by no means complete.

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

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

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

Thirdly, it is quite obvious, from just a cursory glance at the media publications, that those media publications indicate that allegations of any sort that
are being made are confusing, conflicting, often
retracted and incomplete.

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

Further, how can persons who may be referred to in
the media articles know whether they are meant to be
part of any alleged fabrication of women's business?

There are many names mentioned there as being in some
way involved.

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

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

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

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

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

It is suggested that the first part of the material
might be historical or anthropological.
We have heard cursory references to meetings. Is it suggested that at any meeting or meetings there has been any grouping of people or a person who has been putting forward information which may in some way be said to be part of a fabrication of secret women's business?

Whilst my friend has indicated from the authority that he cited of Hallet that an opening can be general,
we would submit that it is entirely inappropriate, in a case like this which is all about whether or not there has been fabrication, to name the people that are alleged to have fabricated. And 2. Say what it is that is alleged to have been fabricated. One cannot start off in a total vacuum and have evidence unfolding at large, which is the way in which Mr Smith is submitting it will unfold. He has got categories of information. But, as I understand it, was almost apologetic, because, as he says, the date by which statements are to be given has not yet passed. Namely, by the close of business tomorrow. And yet we are embarking on the evidence. If ever I have heard the cart put before the horse that would have to be the best example. And it is done in a context which is entirely unknown and unspecified and, as I said, without the supply of statements.

So, we would submit, at this stage, two things and we ask this Commission to respond to this request: Firstly, that there be specification of the allegations of fabrication as we have requested. Secondly, that the counsel assisting the Commission confirm that they will provide statements to us of those who are alleging fabrication by close of business on Friday; or, if it is not received, that there be an indication, from this Commission, that, until such time as statements are received by this Commission from those who allege fabrication, that there be no continuance of that evidence.

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

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

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

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

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

   So that is our request.

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

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

   CONTINUED
It's only short and I will read it to the Commission. This particular letter is written to Dulcie Wilson, but I understand that similar letters have been written to the other two Ngarrindjeri women.

MR ABBOTT: Can I rise to ask whether my friend is reading this out on the basis of any instructions, or because she wishes to take up some time?

MS LAYTON: I have been given - I can answer you if you don't mind sitting down.

MR ABBOTT: I apprehend that the ALRM, if they are fulfilling their charter, should not be acting for any particular group of women. I would expect my friend, if she has received instructions along the line indicated, would be acting for a particular group, since this letter is obviously a response to my clients who do form a particular group. I would conceive that the role of the ALRM, in so casting themselves, appears to be directly in breach - and certainly in breach - of the spirit of the heart of charter.

MS LAYTON: I'm referring directly to a letter that was written to me asking if I could get instructions from certain people. I indicated I can't get instructions, but I will obtain information as to the issues that were raised in that letter. I indicate they are not my clients, and I predicated that. I was informed that the persons would not make available that information and I was requested to impart the information to you. That is the basis upon which I intend to do it. I'm not acting as the ALRM, I am acting as an officer of this Commission, if I can put it that way, wanting to say something in response to a letter that was written to me asking for certain matters to be ascertained, and this is what I have been told to do.

MR ABBOTT: You're reading out a letter that is addressed to my clients, aren't you?

MS LAYTON: Yes.

MR ABBOTT: Can't we wait until I get it? I have
never seen it.

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

COMSR: But that is a request made by counsel.

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

COMSR: The normal way might be to -

MR SMITH: Respond to me.

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

COMSR: Perhaps the counsel -

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

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

At this point, I tell the Commission that I wish to make two requests: one, that particulars be given; and, two, that an undertaking - `undertaking' is the wrong word, an affirmation that statements will be provided by the close of business on Friday, or, if not, then statements be proffered by those who are alleging fabrication to all of those who should receive it at this bar table before any evidence whatsoever commences with regard to this Royal Commission. That is our request.
MR TILMOUTH: I would like to rise to support the submissions which have been made. If I could, I generally adopt the submissions made by Ms Layton. I would like to add a few submissions of my own.

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

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

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

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

MR TILMOUTH: We have got nothing.

MS LAYTON: Nothing.

MR TILMOUTH: Nothing whatsoever.

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

MR TILMOUTH: On what? That's the point we are making. What are we supposed to prepare statements on? We have no idea, with respect, what is supposed to be investigated and what their involvement is alleged to have been.
Could I add the point that on the media statements that Ms Layton talked about, we were only given those at 12 o'clock today. It may not have been clear from what she said, but - and so far as we have had the opportunity to go through a small number of them, in many respects they only appear to be summaries. In some cases, they appear to be only what went to air; that the whole interview, whether it went to air or not, does not appear to be available.

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

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

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

I make the final point that although Hallet still remains, I think, the only book on Royal Commissions, the opening statement that Mr Smith read, or the basis of the opening statement that Mr Smith read in the
quotation from Hallet this morning at p.217 is supported
by reference to Victorian Royal Commissions which
occurred between 1966 and 1977. Since 1977, a great
deal of law in natural justice has developed since then
and, in my submission, things are quite different these
days from what they were in those years upon which that
statement is based.

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

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

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

MS PYKE: I would like to adopt the submissions of
Ms Layton.

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

COMSR: Who is your client?

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

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

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

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

In those circumstances, I completely agree and adopt the submissions of Ms Layton that it is incumbent to
those who are making allegations of fabrication to say
what the allegations are and to say what is anticipated
in the making of the fabrication. Until that is done,
it is a denial of natural justice to require any party
to participate in a sensible way.
COMSR: Are there any other counsel that wish to
be heard in respect of this?
MR STRATFORD: You will remember that I represent Mr
Tim Wooley. Mr Wooley is a solicitor employed by the
ALRM and he initially took instructions from the Lower
Murray Aboriginal Heritage Committee back on 12 October
1993. He continued to act for that committee through
until this Royal Commission came into being.
As early as 25 October 1993, he drafted letters for
his clients to send to the State Minister for Aboriginal
Affairs and the Federal Minister for Aboriginal and
Torres Strait Islander Affairs.
On 23 December 1993, he wrote to Mr Tickner, the
Federal Minister, seeking a s.10 declaration under the
Aboriginal and Torres Strait Islander Heritage
Protection Act. Between taking instructions and the
making of the order by Mr Tickner, he was involved in an
extensive exchange of correspondence with the relevant
Ministers and was involved in extensive discussions with
the anthropologists Draper, Deane and Saunders.
From about 20 June 1994, he was acting for five
senior women as well as for the Heritage Committee. The
nature of this secret women's business and how the
bridge might affect it have never been explained in any
detail to him.
It was really not until around 18 April 1994 that
his instructions became clear, that the main reason his
clients objected to the building of the bridge was
because it somehow upset the spiritual circumstances of
Hindmarsh Island and its surrounds for the women. Once
this secret women's business was raised, matters were
largely out of his hands and taken over by the
anthropologists.
COMSR: I'm not quite clear what point you're making in reciting the background?

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

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

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

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

I also take up the point that has been raised by Mr Tilmouth in relation to funding. It was not until ten to six last night that I received a response to a request delivered on 13 July. This response was an
offer to pay limited costs for the purpose of proofing Mr Wooley and attending while he is giving evidence.
Unless this situation changes, this means that he has no funding for any of the arguments on the issues I have raised in this submission. He will have no representation when others give evidence, and that includes anyone who might say anything, suggesting that he knew of a fabrication or was involved in it and, therefore, he will not have anyone available to cross-examine those witnesses on his behalf to test the allegations.

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

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

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

I have been through the question about allegations. This is not an ordinary piece of litigation, with plaintiff against defendant, where such things are appropriate. The allegations that are made have been broadcast abroad, and it is our function here to inquire into those allegations; that is, to call evidence to see if those allegations can be made out indeed; the allegations that occur in both the print media and the electronic media. So that that is the function. We,
the Commission, do not have, as it were, a mortgage on those allegations. They come from witnesses whom we will call.

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

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

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

There are two ways in which this inquiry could have been conducted. One was to investigate the allegations
of fabrication once they had been nominated. The second
was to investigate the religious beliefs of people as to
whether or not that included what is alleged to have
been fabricated. It appears as though the lack of
particularity about allegation means that the second is
the process and, in particular, the focus on the
confidential envelopes demonstrates more clearly than
ever before, that this inquiry is one as to the
religious beliefs of Aboriginal people and not an
inquiry into the allegations of fabrication, which still
are not articulated. On that basis, Madam Commissioner,
we seek to withdraw.
COMSR:       You can, but, of course, you have made
some submissions to me. I have heard you and I have
heard counsel assisting. I do not know that I have as
yet indicated what I propose to do, but, however.
MS LAYTON:   If there was anything different from
what counsel intended to do, perhaps we should hear. I
understood that counsel was now pursuing the calling of
evidence and I assumed that you, Madam Commissioner, in
not saying anything, were accommodating that process.
If that is not to be the case, then I sit down at this
point.
COMSR:       I must say that I was still mulling it
over in my mind. I have heard submissions from a
variety of counsel. I was considering your request that
there be at least two particulars provided.
MS LAYTON:   I named four in all.
COMSR:       I certainly do not propose to just, as
it were, dismiss it out of hand without considering the
matters that have been put, Ms Layton, but I am, of
course, mindful of the time constraints of this inquiry.
I have allowed counsel some time to consider the various
documents. I propose to consider what has been put, but
I note that another day has virtually gone on these
preliminary matters.
However, I have had a number of submissions put to
me by counsel. I do not know if it has exhausted all
that counsel for all the parties want to say on the
matter, before I consider what might be appropriate in
the circumstances, but what I would propose to do is at
least to take a short break while I consider the matter.
I will withdraw from the hearing for a while, while I
have regard to what you put to me and what the other
counsel have put to me concerning the conduct of the
inquiry.
ADJOURNED 3.10 P.M.
RESUMING 4.32 P.M.

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

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

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

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

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

COMSR: Of course, the Commission cannot know at this stage what information might be uncovered during the course of the inquiry, because we are continuing to uncover facts as the inquiry progresses. However, counsel assisting have tried to meet the concerns expressed by counsel by undertaking to give a more detailed opening on Monday and, subject to the
conditions of the authority given pursuant to Section
35, undertaking to provide statements. I am prepared to
grant an adjournment to Monday for that purpose.

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

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

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

MR ABBOTT: It would answer some of them. It
doesn't answer the issue as to whether or not there was
anything in the nature of a curse placed on this
courtroom.
COMSR: That is a matter that I haven't
overlooked and I am pursuing.
MR ABBOTT: I will wait until Monday.
COMSR: On Monday I would expect, of course,
when we are dealing with the question of releasing
statements, to hear from counsel, as I have indicated
previously, the extent of their special interests so
that I am able to deal with the question of the release
of the statements.
ADJOURNED 4.40 P.M. TO MONDAY, 31 JULY 1995 AT 10 A.M.
The programme for today has been distributed to all counsel and other people interested so that, with your leave, I immediately embark upon the further opening that the Commission agreed to give.

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

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

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

What then is sought by way of my opening, what is sought by way of further detail, is set out in the transcript of proceedings on Thursday, 27 July 1995, and in particular at p.93 of the transcript.
The requests are as follows: First, what allegations are being made about the secret sacred women's business as contained in the secret envelopes which is alleged to be a fabrication?; Two, who are the persons who have alleged that the women's business, or any aspect of it as contained in the secret envelopes, was a fabrication?; Three, who are the persons alleged to be involved in the fabrication and the nature of their involvement?; and, Four, when where and how are the persons alleged to have been involved in any fabrication.

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

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

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

The second question: Who are the persons who have alleged that the women's business, or any aspect of it as contained in the secret envelopes, was a fabrication?
The persons who allege the fabrication are in five groups. Collectively, their evidence amounts to an allegation of fabrication. I deal with each of the five groups in turn. Firstly, those who were at Mouth House on 9 May 1994 and who witnessed or who participated in the discussions and who were, amongst other people, the men, namely: Victor Wilson, and Douglas Milera, to name two. These people, who were the persons who alleged the fabrication, are: Dorothy Wilson, Sarah Milera, Douglas Milera. I ask you to note that in naming Sarah Milera and Douglas Milera, I am relying solely on what they have said to the media; and, in Douglas Milera's case, to other parties, such as Kym Denver. Neither Sarah nor Douglas Milera at the present time appear to be prepared to give evidence to the Commission. None the less, it is appropriate that evidence of statements made by them to other parties be heard by the Commission.

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

The third group of witnesses who come under the heading of persons who, in a sense, allege that the women's business, or any aspect of it contained in the secret envelopes, is a fabrication, are two academics from the South Australian Museum, an historian and an anthropologist historian, both of whom have a long history of academic and personal contact with the
Ngarrindjeri culture and the Aboriginal people of the Lower River Murray. These men assert that the secret sacred women's business is, from their perspective, a recent invention. They are: Philip Geoffrey Jones and Philip Clarke. Their expert views about the non-existence of secret sacred women's business, based as it is on the voluminous literature about the area, is reinforced, to some extent, by their eye witness observations in the Museum of events leading to the emergence of this business.

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

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

In this period, the evidence proposed to be adduced identifies some consultation by the Chapmans and a number of experts employed by them and Government departments with Aboriginal interests. Women's business
and in particular secret sacred women's business, is not raised or identified at any stage during this period until April 1994.

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

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

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

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

I commence with early April 1994. Prior to 12 April 1994, a matter of days prior, Dr Doreen Kartinyeri
telephoned Philip Clarke of the South Australian Museum from her Mid-North home. She told Philip Clarke that she required information on Hindmarsh Island and said that they had very little to stop the bridge and were looking for anything that may help them. Philip Clarke provided Dr Kartinyeri with some references and agreed to give her a printout from his site database prepared for his thesis; his thesis deals with the Lower River Murray Ngarrindjeri people.

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

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

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

A few days later, in the first half, or thereabouts, of April 1994, Doreen Kartinyeri, Hilda Day, Sarah Milera arrived at the Museum and saw there Mr Steve
Hemming and Dr Philip Clarke. Dr Kartinyeri said that she knew something about the significance of Hindmarsh Island and wanted to find something to confirm it in the Tindale collection.

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

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

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

I now move to what has been called the ‘Mouth House meeting’ of 9 May 1994. The Lower Murray Aboriginal Heritage Committee called a meeting of Aboriginal women from the Nunga's Club at Murray Bridge for 9 May 1994. On Friday, 6 May 1994, Dorothy Wilson, who was the programme director of the Nunga's Club, heard about the meeting and decided to go. 15 or so Ngarrindjeri women
travelled to Goolwa on Sunday in a bus; Sunday, being 8 May. The women stayed in a place called The Bunkhouse on the northern end of Hindmarsh Island. On 9 May, on the Monday, at The Bunkhouse, Doreen Kartinyeri spoke to the women, including Dorothy Wilson, and said, amongst other things: 'The men have been down here for months trying to stop the bridge and they can't stop it, so it's now up to us women to stop the bridge.' Dr Kartinyeri then told the women the story about women's business and why the island was sacred. There was considerable discussion about it.

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

At the end of this meeting at The Bunkhouse, Sarah Milera asked Dorothy Wilson to come to her to Mouth House - which, Commissioner, is a holiday cottage at the southern end of the island looking into the mouth of the River Murray. Sarah and Doug Milera were, at that time, living at Mouth House. The other women from The Bunkhouse followed to the Mouth House cottage. At the Mouth House, evidence will be led that present were Shirley and George Trevorrow, Doug Milera, Sarah Milera, Vic Wilson, Tim Wooley, Doreen Kartinyeri and some of the other women who had come from The Bunkhouse.
Doreen Kartinyeri told Sarah Milera to show the letter which had been written out in Bunkhouse and signed by the women there to Tim Wooley. Sarah Milera gave the letter to Tim Wooley and he appeared to read it. He then said that he did not think there was enough in the letter to stop the bridge and that they needed to have more information in the letter. There was then conversation about `Kumarangk', the Aboriginal name for Hindmarsh Island, being the word for `fertile' or `pregnancy'. Patti Kropinyeri started writing some further material in the letter, which had come from Bunkhouse. It was at about this time that Vic Wilson went to a colour aerial photograph of the island on the wall of the shack and said `Look at the map up there.' Then it is alleged Doug Milera said that the island and the waters around it were sacred to Ngarrindjari women and he said `Look at the photo. What does it remind you of?' And he said words to the effect that what was represented in the photograph was a representation of a woman's body. Doreen Kartinyeri said, after a minute or so, `Oh, yes, I can see it. Yes, it's true,' she added, indicating the map and pointing to it and saying something about its resemblance. Dorothy Wilson left Mouth House, at about this time, and, when she returned, the second part of the letter, which was originally composed in Bunkhouse, had been completed. She did not sign the letter again. Police officers were in attendance at Mouth House, at about this time, and there was talk about the protest planned for the next day. The police officers talked to Vic Wilson, Doug Milera and George Trevorrow and also spoke to Tim Wooley. Dorothy Wilson drove Sarah Milera to Signal Point on the Goolwa Wharf, where Sarah went into the office. The next event, Madam Commissioner, upon which we have some evidence, or indication of evidence, is 12 May 1994.

On 12 May 1994, Dr Doreen Kartinyeri, who, of course, was employed in the Family History Unit in the
South Australian Museum, was in the museum, assisted by Mr Stephen Hemming, to compose and send a letter to the Federal Minister, Mr Tickner. The Anthropology Division's clerical officer, Ms Margaret Amon, who was present, on that day, assisted with the faxing of the letter to Mr Tickner and also heard conversation between Mr Hemming and Doreen Kartinyeri. Some of that conversation to the general effect that Mr Hemming would back Dr Kartinyeri all the way.

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

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

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

And it was in about May or June of 1994 that Dr Deane Fergie, an anthropologist, was commissioned by ALRM, firstly, to facilitate a meeting of Aboriginal women with Professor Saunders and later she was commissioned by ALRM and, in particular, Tim Wooley to
prepare a report, which, together with a submission from ALRM, went to Professor Saunders.

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

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

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

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

I now move on to that week of 19 June.

Professor Saunders - and I deal with the Professor Saunders's visit to the museum - Professor Saunders visited the South Australian Museum on about Wednesday,
22 June 1994. Neither Philip Jones, who was, at that
time, the Head of Division of Anthropology at the
museum, nor the Director of the Museum, received any
formal notice of Professor Saunders's visit. Just prior
to the visit, Doreen Kartinyeri telephoned Philip Jones,
from within the museum, and asked whether it was
possible for Professor Saunders to view material which
had been collected in association with a burial platform
from Hindmarsh Island. Philip Jones told Doreen
Kartinyeri that the museum did not have anything like
that in the collection, but that the museum did have
material of that kind from Salt Creek, which is well to
the south along the Coorong. Philip Jones asked Doreen
Kartinyeri from whence she had got that information and
Dr Kartinyeri told Philip Jones that it was from Mr
Hemming. Philip Jones then told Doreen Kartinyeri that
it was his view that Stephen Hemming knew very well that
the material was from Salt Creek. And that it was
misleading to suggest that it had anything to do with
Hindmarsh Island. Doreen Kartinyeri made it clear to
Philip Jones that she was searching hard for anything
convincing to place before Professor Saunders and Philip
Jones told her that she should be careful about making
connections of the sort that Stephen Hemming suggested.

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

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

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

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

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

I now move to 23 April 1995, which was the date of the reconciliation meeting at Graham's Castle at Goolwa. A number of Ngarrindjeri women attended a meeting at Graham's Castle, on 23 April 1995, including Dorothy Wilson, Doreen Kartinyeri and the director of the ALRM
Ms Sandra Saunders. There was considerable discussion about the question of the women's business and Professor Saunders and the stopping of the construction of the bridge. There was anger at Dorothy Wilson who had indicated her opposition to women's business. In the course of the discussions at some stage during the meeting Dorothy Wilson complained to Doreen Kartinyeri that a number of Ngarrindjeri women in Murray Bridge did not know of this meeting and Sandra Saunders said that the meeting was only for Ngarrindjeri women who wished to stop the bridge. Dorothy Wilson then said to Sandra Saunders that their culture includes all Ngarrindjeri women who have a right to know what is going on when culture is being talked about. And Sandra Saunders's reply was words to that effect 'Well, it's not about culture. It is about stopping the bridge.' Dorothy Wilson's retort was something to the effect 'I knew that all along. I just wanted to hear you say it.'

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

Dulcie Wilson was a person, Madam Commissioner, who spoke out early against the notion of secret women's business. In November of 1994, she spoke at a Rotary meeting in Murray Bridge. She hails from Millicent and she was the guest speaker. The speech was printed in the Argus, a local paper, and it contained a reference to women's business and Hindmarsh Island.

On 27 April 1995, or thereabouts, Doreen Kartinyeri rang Dulcie Wilson and Dr Kartinyeri said to her that she had heard that Dulcie was not supporting women's business. Dulcie told Doreen that she didn't know anything about women's business and was never told anything by her grandmother or her aunts and, therefore, would not support something that she did not know about. Doreen Kartinyeri informed Dulcie Wilson that her grandmother had told her about it. Dulcie said that Grandmother Sally had come from Poonindie, on the
west coast. Doreen then said that Auntie Rose had told her. Dulcie Wilson then said ‘Well, Auntie Rose did not tell me anything and I am older than you.’ The conversation between the two ended on the basis that Dulcie Wilson indicated to Doreen Kartinyeri that, in Aboriginal culture, all should know about these things. And Doreen replied with words to the effect that she was the only one chosen.

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

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

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

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

On 11 July 1994, Dr Philip Clarke spoke to Dr Deane Fergie over the telephone. Amongst other things, Dr Clarke argued that Dr Fergie should consult more broadly and he gave her a long list of both male and female researchers who had worked in the Lower Murray. Dr Fergie responded to the effect that, since none of them had worked within the feminist anthropological
tradition, they were not crucial to the issue of whether
women's business, as described by Dr Kartinyeri, existed
in the Lower Murray. There were on-going vigorous
discussions between Philip Jones and Philip Clarke, on
the one hand, and Stephen Hemming, on the other, at the
museum about such topics as whether the literature on
the Lower Murray supported the notion of secret and/or
sacred women's business.

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

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

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

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

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

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

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

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

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

Could I ask you immediately then for the order suppressing from publication the use of the name ‘Nanna Laura’.

COMSR: Pursuant to Section 16A(1)(c) of the Royal Commissions Act, I forbid the publication of the name of the witness ‘Nanna Laura’.

MR ABBOTT: Before my learned friend concludes, could I make one qualification on what my learned friend has said apropos of my clients? There is always a difficulty with nomenclature. He has spoken of my clients and their rejection of there being ‘women’s business’. I want to make it clear that the rejection that my clients have spoken of is, at all times, ‘secret
sacred women's business' in relation to Hindmarsh Island.

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

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

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

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

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

I understood at the last hearing that some counsel were not readily able to identify in what manner they might be said to have a real or substantial reason to
appear. The approach I adopted, in granting leave
without further inquiry, was where, on the face of the
public allegations, there was an apparent interest, then
I granted leave.

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

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

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

There is another matter that I thought I would
mention. I referred briefly to the matter of statements
which are made and published in the media or shown on
television by persons who apparently have knowledge of
the matters being inquired into by the Commission. A
statement to a newspaper or shown on television is not evidence before the Commission. It does not become evidence until such time as the person appears at this hearing and, in the witness box, gives testimony, or until his statement is tendered and received in evidence. Counsel are no doubt well aware of this.

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

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

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

MR SHORT: If there are no other applications by Counsel, my name is Short. I seek leave to appear for Advertiser Newspapers Limited in relation to a discrete issue, which I understand was canvassed when the Commission last sat, in relation to the publication of the proceedings of the Commission. Perhaps initially, I
seek leave to make submissions in relation to that
issue. Do you wish to hear me any further in relation
to the issue of leave?

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

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

MR SHORT: That is certainly so, Commissioner.
COMSR: All right, Mr Short, I am prepared to
grant leave for that restricted purpose only. That you
have leave to make submissions at appropriate times, if
and when I am contemplating making an order restricting
publication or any other order as to confidentiality.

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

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

For instance, there is some evidence in the museum
evidence, as I have called it, which is both expert
evidence and narrative evidence. The expert evidence
cannot be the subject of wider publication because of
the implications of Section 35 of the Aboriginal
Heritage Act. Not so the narrative component. So I will advise the media as to all of that, and my learned friend, Mr Short, too. If he has some problem with that method of dealing with it, he can deal with it at the time of the order.

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

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

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

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

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

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

ADJOURNED 11.05 A.M. TO WEDNESDAY, 2 AUGUST 1995 AT 10 A.M.
MR STEELE: On Monday, I reserved my position with respect to Dr Draper’s appearance, continued appearance, in the Commission. I have now had the opportunity to take instructions. As I indicated to you on Monday, Dr Draper is resident in Queensland and his sole source of income is from a consultancy which he conducts in Queensland. If he attends in Adelaide, he is without income - which, of course, he is not in a position to be in. The Government has declined to fund him a witness fee. In the absence of allegations made against him in the further opening by my learned friend Mr Smith, Dr Draper’s instructions are that I should withdraw, if only temporarily. It may be that allegations will be made against him either personally or professionally in the course of evidence. If that is so, my friend Mr Smith will advise me in advance and I will return to the Commission at that time. It may be that Dr Draper will be called to give evidence in the matter and I would seek to return to the Commission at that time. Pending those develops I would withdraw.

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

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

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

MS NELSON: Not that I’m aware of.

MR SMITH: Certainly our position was that he should get leave and until now he hasn’t had counsel, but simply -
COMSR: Perhaps if you could explain his application, the basis on which you are seeking leave. Has he a special interest, or is he likely to be prejudiced by some evidence led during the course of the inquiry? Is that the basis of your application?

MS NELSON: Certainly that is correct. My client will be called to give evidence by counsel assisting the Commission and I understand, although I wasn't here, but I've had the benefit of some precis that in his opening relating to my client which affect him both personally and professionally and there is a statement which was published in yesterday morning's Advertiser which suggests, at least by innuendo, that he has somehow been a party to the fabrication of material to be investigated by you. To that extent, he does have a special interest and that requires protection.

COMSR: I think perhaps if I clarify something. As far as I'm concerned, the Commission isn't making allegations against anyone. Mr Smith was asked to outline, as I recall, on what basis it could be suggested from the evidence that he has to hand that certain matters of fabrication arise. But I don't understand it to be any allegation either by Mr Smith or coming from the Commission itself. You appreciate that?

MS NELSON: Now I do. That is not, of course, how it is reported.

COMSR: I appreciate how it is reported and that it might be slightly different.

MS NELSON: I have assumed that Mr Smith is, in effect, putting forward material which are allegations likely to be made by witnesses before this Commission. But to encapsulate, that is basically -

COMSR: That is the basis on which you seek leave?

MS NELSON: That's right, at this stage.

COMSR: I take it from what Mr Smith has said that he doesn't wish to be heard on that?
MR SMITH: I accept, Madam Commissioner, that Mr Hemming has a vigorous interest in the matter.
COMSR: Yes. Miss Nelson, you have leave to appear on behalf of Mr Hemming.
MS NELSON: May I indicate that because I'm only recently instructed, although Mr Smith very carefully provided me with all the material which is relevant to my interest in the matter, I'm not confident that I can necessarily do justice to my client's case without some time to consider that material. I'm not seeking an adjournment at this stage.
COMSR: You would be hard-pressed to get one at this stage.
MS NELSON: I thought I might be pushing my luck a bit. I foreshadow, I believe that the first witness will be Philip Clarke and I do have a vigorous interest in cross-examining Mr Clarke. It may be that I cannot do justice to the full extent in that cross-examination without appropriate time for consideration.
COMSR: I appreciate there are some concerns about that. I am sure Mr Smith will address that matter.
MR LOVELL: I seek leave to appear on behalf of Mr Christopher Kenny, who, as I understand from discussions with Mr Smith, may be a witness later in the Commission.
COMSR: Well, it is not apparent to me at this stage quite what his special interest might be. Are you seeking leave at this stage, or is it a matter that can be deferred?
MR LOVELL: It certainly is a matter that can be deferred.
COMSR: I will note that you are making the application and that when you wish to pursue it I'll bring it on again.
MS LAYTON: We have been instructed by the ALRM that it no longer seeks to be represented at the hearings of this Commission. Whilst it's inappropriate in this Commission to give reasons, for reasons that you have
raised before, because of the public importance of this
decision and the fact that it hasn't been taken lightly,
the ALRM would seek to make four short points and to
make one or express one legal concern. I would wish to
do that.

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

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

COMSR: Are you simply going to nominate the
points?

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

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

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

The second point is that the Terms of Reference of
the Royal Commission have included that the resolution
of the disagreement within the South Australian
Aboriginal community has been one of the reasons for the
holding of the Commission. However, we see that this
can never resolve such a disagreement and is being
further divisive and includes the anthropological
profession. We cannot be part of a process which
further divides the Aboriginal community.
The third point is that the ALRM has not and cannot
represent any particular Aboriginal groups - and that
has included the women who were represented by Miss
O'Connor, which included Doreen Kartinyeri. To the
extent that it may have been inferred that by ALRM that
Miss O'Connor's clients could be represented by us, we
wish to disabuse anybody of that position.
COMSR: You are saying that it is mutually
inconsistent to be -
MS LAYTON: That is correct. Therefore, that
includes Doreen Kartinyeri and those whom Clare O'Connor
represented and who still remain unrepresented before
this Commission.
MR ABBOTT: By choice.
MS LAYTON: This is my turn, Mr Abbott. The ALRM
also no longer wishes to be represented as an
organisation, but any of its employees whose names may
be raised in evidence may wish to be separately
represented; like, for example, Tim Wooley has been in
this Commission.
Therefore, in summary on those points, the ALRM has
decided it could not continue to seek protection of
Aboriginal traditional beliefs by challenging the
validity of the Royal Commission, including its
processes, but, at the same time, participate in what it
considers to be an unlawful process.
The legal point that we wish to make today,
particularly having regard to the planned evidence, is
this -
COMSR: Well now, you want to make a legal point
MS LAYTON: Yes. It is appropriate that we make it here, if the Commission pleases, because the Commission may wish to consider this point in the light of what it seeks to do by way of planned evidence this morning. We consider it appropriate to raise it. It's only short.

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

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

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

MS LAYTON: Certainly. I didn't want to go into it. The short point is that the Commission cannot receive into evidence any of the reports of Dr Draper, Mr Lewis, Dr Edmonds, Dr Deane Fergie or Professor Cheryl Saunders without the calling of those witnesses. Further, that any witnesses called by the Commission cannot rely on those reports in the absence of the appropriate authentication of those reports.

I understand that evidence is to be given this morning which may well rely on those. We would submit that, for reasons which have been elucidated by Gavin Griffith, it would be an unlawful process. That is the point we wish to make.

COMSR: I note, Miss Layton, that you have withdrawn from the Commission.

MS LAYTON: That's correct. With Mr Collett.

MISS LAYTON AND MR COLLETT WITHDRAW

MR CHARLES WITHDRAWS

MR TILMOUTH: I wish to make points on behalf of my client.
In respect of what? Now, we have a programme for this morning, Mr Tilmouth. I can't be spending the day listening to statements.

I understand that there is a programme today. The first point I want to make is that we still haven't been given any statements whatsoever.

That's right.

I will deal with that.

Mr Smith will deal with that. I'm going to ask Mr Smith to outline what is going to occur today and that might well traverse the matters that are of concern to you.

I seek to be heard after he raises those matters.

We will see.

The authorisation of the Minister for Aboriginal Affairs, the last authorisation dated 27 July 1995, by clause 8 empowered you to require undertakings to make directions and to impose requirements in respect of persons taking the benefit of the authorization.

Accordingly, by letter dated 28 July 1995, the Commission required that persons having information divulged to them, pursuant to the authority, agreed to give evidence if required as a precondition to being forwarded certain reports and evidence statements; in particular, evidence statements from the witnesses from the South Australian Museum. Some parties did not give that undertaking. Others did. Accordingly, there are some parties represented in this inquiry who do not have notice of the evidence about to be led from the employees of the South Australian Museum.

Now, it could be said: be that on their own heads. But, it's the position of the Commission, as I understand it, that, none the less, some leeway will be granted to those people. So that the evidence from the South Australian Museum will be called by me commencing this morning and will be in-chief over the next two to three days. That other counsel, if they wish, can
reserve their rights to cross-examine on Monday, 7
August - that's depending on what occurs and subject to
review by you, Madam Commissioner. Material, of course,
will be handed out this morning.

As to rights of cross-examination and subject to
what occurs in the next two days, that may not arise
until Monday. The order of cross-examination normally
will be based upon the degree of interest in the
witness.

Taking Mr Clarke as an example, I would envisage
that Miss Pyke for Dr Fergie, perhaps, and also Miss
Nelson for Mr Hemming would have the most interest in
the witnesses Clarke and Jones, and Mr Abbott perhaps
the least. The converse would be true in the case of Mr
Hemming's evidence.

I emphasise to counsel on your behalf that it's
always the case that the extent to which
cross-examination over the same ground will be permitted
is in your discretion.

I mention, by way of an opening statement, the s.35
problems and the question of media reporting. Evidence
will be led from the Museum witnesses by the tendering
of statements of evidence settled by oral testimony, as
there is a mixture of expert and eye witness evidence.
Taking the case of Dr Philip Clarke, for instance, his
statement of evidence and his oral testimony can be or
will be in three parts. First of all, he will tell you
and those here of the history of the Ngarrindjeri people
- and that part of his evidence will also include a
short eight minute film. The second part of his
evidence will be an examination by him of the culture
and tradition of the Ngarrindjeri people with particular
reference to women's business and secret sacred women's
business. The third part will be what I've called
`narrative evidence' as to certain events in the South
Australian Museum in the months leading up to and beyond
the banning of the bridge on 9 July 1994.

Madam Commissioner, I would contend to you that the
second section of this evidence has, at least, a risk of
involving discussion of or divulgence of information in
contravention of Aboriginal tradition, in breach of s.35
of the Aboriginal Heritage Act - subject, of course, to
the authorization. So, I will be suggesting to you,
Madam Commissioner, that the court be cleared for that
section of the evidence and that there be a suppression
order on production of that part of the evidence and
that part of the transcript until the Commission is
satisfied that there is no such illicit divulging.
For the sake of those present, by `clearance' it is
meant that only Commission staff, parties given leave to
be represented on their behalf who have an interest in
the area of the evidence and their legal representatives
should be present. There may be other occasions which
arise in the evidence which will be dealt with in like
manner.
I suggest, if it be possible before we start with Mr
Clarke's evidence, that you deal with the question of
who should be entitled to be present in that middle
section of the evidence of those at the bar table.
Before I sit down, there must be a signed
undertaking as to confidentiality by counsel before they
have an entitlement to even ask for leave to remain in
the closed hearing. If I could have an assurance from
counsel that the original confidentiality undertaking,
not the second one, be executed.
CONTINUED
MR ABBOTT: We are able to give that assurance.

MR TILMOUTH: That assurance is given, but I still seek leave to make a submission to you on the process that has been undertaken today. I can put it briefly.

COMSR: If, at the conclusion of the evidence, you feel that fairness to your client demands or suggests that certain concessions be made, I will hear you then, but, as I understand it, your concern is with having sufficient time, is it?

MR TILMOUTH: The concern is with the whole process. It is better to divulge the material from the start, so that we can have adequate notice rather than to give it on the blind. In my submission, that whole process is totally unsatisfactory, but I will just have to wait and see, on the current proposal, where we stand.

May I make the point as well, without elaborating, the question of funding with respect to my client is still not resolved. At the current stage, I propose to leave Mr Kenny here to deal with the situation.

MS NELSON: I give a similar assurance relating to the undertakings. I just want to raise something briefly in relation to the foreshadowed application to, in effect, hold certain parts of the hearing in camera. I would not be concerned if that were to happen, provided that, at the end of that period, I was entitled to invite you to review that situation.

My client's position is that he has been very publicly vilified and that is likely to be happening in the context of the narrative of events that took place and discussions that it is alleged he had with, for example, Philip Clarke, and what he may or may not have said in those discussions. I cannot see that, on the face of it, there is any reason why, for example, his explanation of what happened, and his denial of certain allegations that I understand Philip Clarke will make, should not be made public, because it really does not offend against any of the matters that attract
confidentiality. I would be disturbed if that aspect of
the evidence were somehow closed to the public.
If I can indicate that my interest is confined to
that aspect of it. I accept that there are other
aspects of it that do attract confidentiality, but
perhaps it is better to look at it in context when you
actually come to that situation.
COMSR: Perhaps I will just clarify, Mr Smith,
is the portion of the evidence that Ms Nelson has
alluded to, part of that which you say must, of
necessity, be heard in private?
MR SMITH: No, the narrative part is not to be
heard in private. It does not involve any divulgence
which would amount to a contravention of Aboriginal
tradition - at least, the in-chief part of that.
MS PYKE: Perhaps I will make one comment. It
seems to me that in terms of the closing of the court,
that anything that otherwise is in the public arena, the
court should not be closed for. It might be that
aspects or parts, for example, as my friend has just
opened, may need to have the court closed, but it seems
to me that a whole lot of evidence about culture and
tradition is quite readily available and forms part of,
if not the public record, certainly is in the public
domain. I think to close the court unnecessarily is, I
would submit, inappropriate. Certainly there will be
issues that perhaps require the court to be closed.
COMSR: The point is this though, that I have to
ensure that the terms of the authorisation are not
exceeded and that there is no divulgence of information
contrary to the provisions of Section 35 of the
Aboriginal Heritage Act. Of course, that can happen by
inadveritence, it can happen during the course of
questioning, and, as I see the situation, that
authorisation should be strictly construed, and the
possibility that there will be some inadvertent
divulgence must be guarded against.
As that particular section deals with matters of Aboriginal tradition, I do not think that we can be closing the court, opening the court, closing the court, as each section is dealt with. In my opinion, the only practicable way is to deal with the whole of that section in private, otherwise there is at least the possibility that the terms of the authorisation will not be complied with.

MS PYKE: Our concern is this: if there is, what I might term, healthy debate between anthropologists, that should be in the public arena and not behind closed doors.

COMSR: I appreciate your concern, but I, of course, am constrained by the terms of the authorisation and I have to ensure that the possibility of something being revealed that should not be revealed does not occur, because once the damage is done, it cannot be undone.

MS PYKE: Might I say, part of our difficulty is that we do not have any of the material, so we fall in that category.

COMSR: In that case, the sooner the evidence gets underway, the sooner it will be known to you.

MR ABBOTT: Could I make a suggestion that was followed in the State Bank Royal Commission, where one of the Terms of Reference were to avoid any damage to lenders from the State Bank, and this occurred regularly? The evidence was taken in camera, as it were, and the lively debate did or did not occur in camera, and the Commissioner then decided whether parts or the whole should be released to the media and to the public generally. That proved to be, I suggest, a satisfactory way of dealing with it.

There is no reason why such a procedure could not be adopted here. That would have the effect of not stifling the debate. At the same time, if it transpired that none of the debate transgressed the provisions of
Section 35, the material could then be released for 
public inspection and examination.

COMSR: That is something I could bear in mind.

At this stage I have not -

MR ABBOTT: Any evidence taken in camera does not 
have to always remain in camera.

COMSR: That is so, but I am certainly not 
making a ruling on that at this time.

MR SMITH: Can I suggest at this stage, before we 
embark on Mr Clarke's evidence, which we are ready to do 
right now, that we be given five minutes to just ensure 
that all the people who are entitled to be present 
during that part of Mr Clarke's evidence, for which the 
court will be closed, have signed the requisite 
undertaking. Therefore, we can just move straight into 
that section of the evidence without any problems.

The counsel, instructing solicitors and any clients 
that are likely to be given leave by you to remain, 
should sign this undertaking now. We have the forms 
present. It would take five minutes perhaps. Can I 
indicate, just for those present who are interested in 
the commencement of this evidence, that the commencing 
evidence will take approximately an hour, in any event, 
before any orders are to be made by you.

COMSR: We will take a short break.

ADJOURNED 10.33 P.M.

RESUMING 10.51 A.M.

MR SMITH: Madam Commissioner, we have reached a 
considerable milestone, I am about to call a witness.

COMSR: I take it that you are in receipt of the 
necessary undertakings as to confidentiality?

MR SMITH: Yes. Perhaps there is one matter we 
could settle. Mr Sykes, who represents Mr Campbell, 
wishes to leave the hearing, but with a reservation.

MR SYKES: Yes. Commissioner, I addressed you on 
Monday in connection with my client's interest in the 
inquiry, and I have leave. I will not be in a position 
to be here this afternoon. There will be occasions when
I cannot be here throughout the hearing of the evidence of the witnesses. I have spoken to counsel assisting and I would be available to read the transcript, and I would like, in fact, a copy of the transcript so that, when I do appear, I am fully apprised of what the witnesses have said in their evidence.

The reason why I cannot be here is simply because of other commitments. Some of those commitments are, in fact, the taking of statements which, of course, are due. I have to attend to those, so I physically cannot be in two places at once.

If I have access to the transcript then I will be fully apprised of the proceedings and be in a position, when I do appear, to proceed to represent my client's interest. I understand that that is acceptable to counsel assisting.

COMSR: Mr Sykes would be a person who, you would say, should be permitted to remain?

MR SMITH: He would be a person permitted to remain during the closed session and, therefore, would be a person entitled to any suppressed portion of the transcript.

COMSR: Under those circumstances, I am prepared to release a copy of the transcript, on your undertaking as to confidentiality.

MR SYKES: I signed the undertaking. I can assure the Commission that that is so.
RF 5B

P.A. CLARKE XN

1  MR SMITH CALLS
2  PHILIP ALLAN CLARKE   SWORN
3  EXAMINATION BY MR SMITH
4  Q. Mr Clarke, I think you are a historian and
5     anthropologist currently in the employ of the South
6     Australian Museum. Is that correct.
7  A. Well, rather than an historian, I would rather classify
8     myself as an anthropologist and a human geographer, but
9     I do frequently employ the methodology of an historian,
10    so it is still correct, yes.
11  Q. I think it is the case, isn't it, that in connection
12    with this matter, you have prepared a lengthy report
13    which touches on a number of matters, but, in
14    particular, the history of the Ngarrindjeri people,
15    matters relating to 'women's business', as well as a
16    documented narrative of the part you have played, or you
17    have observed being played, in the development of the
18    Hindmarsh Island Bridge matter, is that so.
19  A. That's correct.
20  Q. Looking at this document produced to you, is that indeed
21    the report you have prepared for the purposes of this
22    inquiry and signed by yourself.
23  A. Yes, it is.
24  Q. I think, in broad terms, that report is divided into two
25    sections, is it not.
26  A. That's right.
27  Q. You would describe those two sections as what. Perhaps
28    I could lead you on that. I think it is the case that
29    what has been regarded as your expert view is set out
30    under a number of headings.
31  A. That's right.
32  Q. And then, in addition to that, you have set out, in a
33    chronological way, your observations of certain events
34    leading up to the banning of the Hindmarsh Island Bridge
35    and the aftermath, is that correct.
36  A. That's right.
37  Q. I think the report, in the sense that it is signed by
38    you, is dated 26 July, 1995, is that right.
A. That's right.

MR SMITH: I intend now to go into that report. It might be the most expeditious way to have it tendered at this stage, subject to me taking Dr Clarke through it.

I seek to tender that report. I have handed copies to all my learned friends.

EXHIBIT 1 Report of Philip Allan Clarke tendered by Mr Smith. Admitted.

COMSR: Of course, Exhibit 1 will have to be protected by some order as to privacy.

MR SMITH: Yes, because some sections of the report canvass the matters that are possibly sensitive, you will need, at this early stage at least, to suppress it in its entirety.

COMSR: Yes, I do. I make an order suppressing the Exhibit 1 from release, and I forbid the publication of any portion of the report.

MS PYKE: Commissioner, at this stage can I simply say that this was handed to me as Mr Smith got to his feet. I am not able to indicate whether I have objection to any part of it. I wish to reserve my right, once I have read it, to make any objections.

COMSR: I appreciate that.

MR SMITH: That is taken.

COMSR: Meanwhile, of course, the report has been suppressed and no portions of it are to be made available for publication, so I think your interest is sufficiently protected there.

Q. Can I ask you, first of all, to turn to page 24 of the report. I think at page 24 of the report, you set out there, your present position and the history of your work experience. Is that so.

A. That's so.

Q. And also, could you tell us, in addition to what you have set out there, for how long you have been working at the museum.

A. A little over 13 years.
Q. You then list your formal qualifications; Bachelor of Science majoring in botany and zoology, University of Adelaide, 1979 to 1981. Bachelor of Arts majoring in anthropology, University of Adelaide, 1983 to 1986. Master of Arts Qualifying course in geography, University of Adelaide, 1989 and a PhD in social anthropology and human geography, University of Adelaide, 1990 to 1994 and that is correct, is it.
A. That's correct.
Q. Can you tell Madam Commissioner when it was that you started work at the museum.
Q. What did you do, what did that involve.
A. I had a number of jobs, in that year. First doing voluntary work and then working on a grant conducting research into the materials we had in the museum that related to the Darwin area. So, I was employed to compile lists of publications, researching the archives and to compile lists of the objects that we had in the museum that related to this research project. That was in 1982.
Q. In 1983, I think you started working on something to do with secret sacred men's objects, is that correct.
A. That's right. In 1983, the museum was being approached by various Aboriginal organisations with a view of repatriation of certain classes of objects. At that stage, the museum didn't really know what we had in the way of such objects in our collection, so I was employed to go through the registers and start coming up with a list of objects to enable, sometime later, negotiations and consultations to take place. I also started physically organising those objects in an appropriate storage area.
Q. I think it was later in 1983 that you took up a permanent position at the museum, is that so.
A. That's right. As a museum assistant, at that stage.
Q. Your direct superior was, whom.
A. Mr Steve Hemming.
Q. I think it was in the 1983 year that you started your Bachelor of Arts degree, is that so.
A. Yes, that would be right, yes.
Q. What was your major, when you started your degree.
A. The Bachelor of Arts?
Q. Yes.
A. It was a double major in anthropology, but I did other subjects in archaeology and human geography.
Q. I think one of your tutors, during the 1983 year, was Dr Deane Fergie, was it.
A. That's right.
Q. Over the years following 1983, I think you moved through the following hierachical steps in the museum; registrar, collection manager, curator and senior curator, is that right.
A. That's right.
Q. What is your position now.
A. I am a senior curator, at the moment, working on a project which is of - with a national focus; and that is the compiling of an inventory of restricted men's objects from right across the country: objects from other museums and other cultural institutions.
Q. Do you have a status in some part of the Aboriginal community in Australia which enables you to do this sort of work.
A. In order to work with restricted men's objects, I do have an informal status as a senior man who can work with such materials when senior men come down from remote regions in northern Australia, to either take back or store or just talk or use objects that are in our collection. So I and one or two other senior people in the museum do have an informal initiated status.
Q. Having graduated, I think, in 1986 with your BA majoring in anthropology, you commenced your Masters Qualifying course in geography, is that correct.
A. There was a couple of year break for that, in which I was engaged in field work and publishing, but, yes, the qualifying course I commenced in 1989.
Q. Were you under the supervision of any particular person.
A. In that year, Professor Fay Gale.
Q. I think that was a bridging course to your PhD, was it not.
A. Yes, it was a course that was offered by Professor Gale to enable me to get into a postgraduate degree, without having to spend several years doing an honours degree in anthropology or geography.
Q. You then advanced to your PhD and I take it that you had supervisors for that, did you not.
A. Yes, I had three supervisors: I had Dr Kingsley Garbett from the Anthropology Department of the University of Adelaide; I had Mr Peter Smailes from the Geography Department of the University of Adelaide, and I had a third supervisor, Dr Chris Anderson, who was, for the most of the degree, Head of the Anthropology Division, but, towards the end, he was and is the Director of the South Australian Museum.
Q. Your PhD I think was conferred on you in April 1995, is that correct.
A. That's right.
Q. It therefore took approximately four years.
A. Yes, I submitted it in March 1994 and it took - it wasn't conferred until April the following year.
Q. Is that about average, or is that a -
A. No, that would be considered very fast, but, because of my extensive field work in the Lower Murray region, which was the focus of the PhD, I was basically able to commence writing as soon as I was formally enrolled in the postgraduate degree.
Q. At p.25 of your `report', Exhibit 1, you have listed your publications there, haven't you.
A. That's correct.
Q. I think the final publication you have mentioned, over on the bottom of p.26, is, indeed, your thesis.
A. That's right.
Q. Entitled `Contact, Conflict and Regeneration.
A. Aboriginal Cultural Geography of the Lower Murray, South
Australia’. The title itself suggests that it had very much to do with the Lower River Murray region; and, to ask you an obvious question, that is the case, is it.

A. That is the case. Lower Murray defined as the cultural and physical region roughly from the tip of Cape Jervis in a straight line through to Wellington and then down to Kingston. That sort of triangular area that takes in the lower lakes, the Coorong and the coastal region of Encounter Bay.

Q. The publications you have mentioned, leading down to your thesis, at the bottom of p.26, in excess of 20 or so publications, how do you regard a publication. What is a publication, in the context of your discipline.

A. The publications I have put here are the more major ones that I produced. Ones that reflect my field work and research interests. So, starting from the mid 1980s, my main publications are to do with Aboriginal use of the physical environment; particularly in the Lower Murray, but also the southern South Australian region in general. There are also publications relating to my professional role in the museum in relation to computers and object registers. But, during the last five years, I have been moving into the area of Aboriginal cosmology, the more cultural aspects of Aboriginal perception and use of the landscape, and they are the publications that I am currently working on, and I have got a number that are in the process of being submitted.

Q. The book I produce to you, is that, indeed, your thesis.

A. That's correct.

Q. That runs to some, just to be precise, 425 pages.

A. That's correct.

Q. The field work that you did to compile that thesis, can you give us and the Commissioner an idea of just how much of the work involved field work and what it was.

A. Yes, early in the 1980s, I accompanied mainly Stephen Hemming on quite a large number of field trips to the Lower Murray and South East region, where we were contacting Aboriginal people in the community who were
regarded by the rest of the community as knowledgeable informants on particular aspects of Ngarrindjeri culture. My particular interest earlier on, as I have already stated, is the more hunting and gathering technology part of it. But, as time went by, my interests emerged into the mythology and history. Steve Hemming's interest was mainly in the Aboriginal history side of that field work. Sometime in the late 1980s, my relationships with the Aboriginal community became less formal, for a number of reasons. And my field work, from that stage, tended towards more participant observation type work and less, sort of, formal museum visits. So, there are a number of tapes that document the early part of that field work, but, over the last seven or so years, I have mainly relied on participating and just picking up knowledge through that participation.

Q. By the time of the conferring of your PhD, in April 1995, you were married, were you not.
A. That's correct.
Q. I think your wife is Susan, is that correct.
A. Yes, she was Susan Rankine, formerly a resident of Point McLeay.
Q. And Susan is a Ngarrindjeri lady.
A. That's correct.
Q. And the daughter of Henry and Jean Rankine.
A. That's correct.
Q. Of Point McLeay.
A. That's correct.
Q. Would you describe Henry and Jean Rankine as prominent Ngarrindjeri people.
A. Yes, very much so.
Q. We are to see a film entitled 'Ngurunderi. A Ngarrindjeri Dreaming', prepared by the South Australian Museum.
A. Yes, mainly by Steve Hemming.
Q. I think your wife features in that wife, does she not.
A. Yes, she is one of the Ngurunderi's wives.
Q. Before I move into your report with you, you have been embroiled in the debate about the Hindmarsh Island bridge, have you not.

A. That's correct.

Q. Could you tell the Commissioner to what extent that has caused problems for you and the Ngarrindjeri people you know.

A. It has caused quite a few problems and, initially, I tried to maintain a very impartial position on the problem, but, as it has developed among Aboriginal people and anthropologists, it has been increasingly difficult to stand back. So, my views that I have put forward today would be entirely my own and certainly, or not necessarily the views of my extended Aboriginal side of my family. But, yes, a number of personal and professional relationships that I have had with Aboriginal people have suffered and I suspect, in a couple of cases, they will never be back to the way they were, before the Hindmarsh Island bridge issue.

Q. Do you hope that this inquiry will have somewhat of a cleansing effect.

A. Yes, I suppose I am here, to some extent, representing the anthropology profession, because I feel that anthropology, as a discipline, has let down Aboriginal people in this issue, but I am also here as someone who has a lot of knowledge about the region and I hope that the sharing of my knowledge with the Commission will help to bring about some resolution.

Q. Can I take you to p.24 of your report, where, under the heading 'Formal Qualifications', you have included a heading 'Experience with Aboriginal Culture'. Is it the case that your field work in the Lower River Murray began in the 1980s with work you were doing with Stephen Hemming on the Ngurunderi Exhibition.

A. Yes, that was a project that dominated our activities through the early and mid 1980s.

Q. You have a botany and zoological background. At least, your primary degree was focused on that, wasn't it.
A. That's right.
Q. Did your initial work in the Lower River Murray with Stephen Hemming then concentrate on that.
A. Yes, I concentrated on developing lists of plants that Aboriginal people utilised and recording the knowledge that they had about how those plants were used. And, yes, that eventually led me into looking at the cultural aspects of plants and animals as well.
Q. Did that necessarily bring you into contact, in any formal way, with Aboriginal people and, in particular, Ngarrindjeri people.
A. Yes, we were in contact with quite a few elderly and middle aged Aboriginal people. And, particularly in the case of the elderly Aboriginal people, most of them are now deceased. For anyone who is - who looked through the acknowledgement section of my thesis, they will see that we were working predominantly with women and certainly the more informal part of my field work was dominated with work and activities with Ngarrindjeri women in the region.
Q. Your field work has been on-going since the 1980s, isn't that so.
A. In relation to the Lower Murray, it has never stopped.
Q. No doubt it has some informality about it, by reason of your marriage, also.
A. That's correct.
Q. Do you spend then time, social time, family time, in the Point McLeay area.
A. Yes.
Q. Turning to your thesis, for a moment; it is entitled `Contact, Conflict and Regeneration'. Could you paint us a picture of what it is about.
A. Yes, I guess to reduce it to just a few sentences; what I was trying to do was develop a model of an indigenous culture that was going through rapid transformation. A model that explained how they related to the landscape which, in itself, was rapidly transforming. So, parts of the thesis deal with the preEuropean period. Parts
deal with the nature of European and Aboriginal contact.
And then several chapters deal with the contemporary
ethnographic situation which was largely based on the
more informal part of my field work.
CONTINUED
So that there's, you know, three main clumps - and I've tried through the thesis to come up with a model that explained how Aboriginal people relate to the modern landscape and tried to draw out threads of that relationship that relate specifically to pre-European influences and other influences that have really been derived from their interaction with a sort of broader non-Aboriginal controlling force.

Q. To prepare that thesis, to what extent did you familiarise yourself with the existing data; talking about both data, such as material culture and culture as set out in the literature.

A. Yes. My thesis has over 500 references ranging from fairly brief historical accounts from explorers to, you know, more detailed ethnographic work in the region. There is a lot of material there. Then, in order to use such widespread material generated from different sources, I had to develop a framework which gave the reader of the thesis some idea of what the biases would be for particular parts of that very large resource of literature that I was drawing upon.

Q. Would you or would you not be able to say that, in the course of preparing that thesis and studying generally, you read all there is to be read.

A. As far as I know.

Q. In relation to the Lower Murray.

A. Yes. As far as I know, I've, you know, read every major piece of ethnographic material that relates to the region. Since submitting the thesis, one or two minor things have cropped up - and, of course, the Berndt book - that is Ronald and Katherine Berndt's book of `The Yaraldi World That Was' - was available after my last draft of the thesis was already prepared, so I have incorporated some of that material into the thesis. That was a major body of work that wasn't addressed in any major way, just because it came out just prior to submitting the thesis.

Q. That's Berndt, B-E-R-N-D-T.
A. That's right.
Q. And Yaraldi.
Q. At the time of the conferring of your PhD in April 1995, you having submitted it in March 1994, the Berndt book was published, wasn't it.
A. That's right; it was available.
Q. Published in 1993. During the course of preparing your thesis, were you able to refer, in any formal way, to it.
A. I knew of its existence within the Museum, but there was a rather torturous history of trying to get it published and I was reluctant to refer to the thesis until I knew - not the 'thesis', refer to the Berndt manuscript until I knew what its status to be. I was hoping it would either appear earlier than the thesis, or appear well after it.
Q. When it was finally published in 1993, the Berndt book I should say, you had substantially finished writing up your thesis; is that the case.
A. That's right.
Q. When you had finally been able to read the Berndt book, did you make any comparisons as between their data and your own.
A. Yes. I would have to be honest and say I was worried before reading the Berndt book that it may present data that led away from the picture that I was portraying through the thesis. I found that in every major respect that it reinforced aspects in my thesis. So, initially, I had permission from my supervisors not to refer to the thesis, but there were some examples in the Berndt book that were very pertinent to my thesis, so I still included them in a brief form.
Q. Did any aspects of the Berndt writings, as published in the book, initially give you any concern.
A. Well, as Professor Tonkinson said in the foreword in the book, it's an old-style ethnography. It's trying to portray a culture in its totality without really
providing a lot of, you know, comparative material and
sort of historical framework. So, the book is really
the research notes, field notes of the Berndts and not a
great deal more. I guess I was worried that there was
quite a bit of historical material that they could have
referred to but didn't. But, on the other hand, you
know, others would regard that as the beauty of the book
in that it's, you know, their sort of account from the
1940s without much influence from other research. So, I
guess with its perceived weaknesses, in another light
would be seen as its strengths.

Q. There were some topics of Aboriginal culture, in
particular the Ngarrindjeri culture, which were dealt
with rather frankly, were there not, which interested
you.

A. Yes. I was aware, you know, through talking to people
like Steve Hemming, who was fairly familiar with the
manuscript, that there was a great deal of scorcery,
certainly in the manuscript, the Berndt manuscript. I
did raise on a couple of occasions with other staff
members that that might be a source of problem for
publishing the book. Scorcery is, you know, basically
used and portrayed in the book as a major weapon for
killing people, and I had concerns about how the
contemporary Ngarrindjeri community would view the
rather frank treatment of that.

Q. There were other topics dealt with rather frankly in the
Berndt book.

A. Yes. I guess I was, well, I was definitely more worried
with the scorcery. There is quite a bit of material on
the sort of female realm of Ngarrindjeri life; that is,
childbirth, menstruation, abortion, that type of thing.
There are initiations described. So there are quite a
few things that, if the publishing was going to become
more widely spread, particularly in schools, that would
cause problems.

Q. I return briefly for the moment to your list of
publications at p.25. The list shows, does it not, that
your early publishing career reflected your botany background; is that so.

A. That's so, yes.

Q. Then, in 1990, if your publications are any indication, your interest broadens.

A. Yes. I suggest that my interests broadened earlier than that.

Q. There was certainly a couple of years' delay when you didn't publish anything.

A. In the late '80s I became much more interested in the cultural aspects of plants and animals and how they fitted into the Ngarrindjeri cosmos. So, in a sense, my earlier work had pretty well exhausted the historical literature and a lot of those informants of the biological side of my interests, you know, were deceased. So, you know, it was a natural progression on to sort of, you know, bigger and broader and more challenging topics.

Q. Of course, there is a gap in your publishing career, it seems, between 1991 and 1995 and that was because you were working on your thesis in that time.

A. Yes. I didn't want to string out my thesis, so all of my spare time - and I was never formally given any time off from work to work on my thesis - so all my spare time that I normally had would be taken up writing papers which was used up to produce the thesis.

Q. Can I go to your commencement of your report, if I could call it that, Exhibit P1. You deal in the first section of your report with the history of the Ngarrindjeri people. I think in conjunction with the history, as set out there, you have divided that into: The pre-European period and the effects of European settlement. In conjunction with that, you have actually provided a chronology or what you could call a 'Time Line'.

A. That's right.

Q. Can you refer us to that. That is in appendix A at p.11.

A. Yes. That's a Time Line out of the back of the thesis.
I have truncated it in order to present it in a usable form. I've - once having collected all of the historical and ethnographic information available, it was quite clear that there were three distinct phases that Aboriginal people fell into in the sense of their relationship with the landscape.

Q. Those three distinct phases are.

A. The exploration phase, which commences with - well, it commences with the British Empire expanding into the Pacific region. In terms of the Time Line, as I presented here, it goes from Sydney being established and goes through rather the severe small pox epidemic, various sealers informally settling the southern coastal regions of South Australians and, therefore, beginning to interact with the Lower Murray people, the Ngarrindjeri people. Then, the official colonisation, the colonists who expressly came out from England to settle in South Australia arrived in 1836. For a few years, there was still much exploring to do and overland routes to be established. However, as I have set out here, by 1859, the first Aboriginal mission in Australia was set up, and I called the commencement of that phase 'The colonial incorporation phase'. It was this phase that Aboriginal people, those who had survived small pox, were, you know, largely dispossessed of their land and eventually forced onto missions, such as Point McLeay which was established in 1859. However, throughout the 19th century, there were still quite a few Aboriginal groups in the Lower Murray who were living a sort of joint hunting and gathering sort of European existence and they had freedom, more or less, to move around as they saw fit, particularly in the southern and eastern parts of the Lower Murray. The western side of the Lower Murray, by the late 19th century, had largely been taken up by pastoralists and farmers. Then, by the turn into the 20th century, the Government started getting more heavily involved in Aboriginal affairs. Through the 19th century, they were
more remotely involved. They left the running of missions to, more or less, private organisations, but, starting with the Aboriginal Aborigines Act in 1911, Aboriginal people were officially segregated from mainstream Australian society and places like Point McLeay became even more important in terms of being a place where the majority of Aboriginal people from the Lower Murray Region were placed for one period or another. Then in 1911 is what I would call the commencement of the third phase, the final phase, or the Government welfare phase. That's to signal the role of Government increasing in relation to Aboriginal affairs. The Time Line goes right through to the present with the activity around the 1960s when Aboriginal people gained more rights as citizens, right through to the early '70s when missions were, Government mission stations were starting to be handed back - well, handed to Aboriginal-run councils for management right through to the present. But the influence of or support of Government is still strong in the Aboriginal, in those Aboriginal settlements today.

Q. You come then to the conclusion on p.3.5 of your report that Aboriginal culture is really a group of mission cultures, do you.
A. Yes.

Q. In broad terms, that is what you include.
A. Yes. One of the findings in my thesis was that although Aboriginal people often appropriate terms from the sort of what we call in anthropology as 'tribe literature' to classify their various groupings to date, in terms of interaction within the Aboriginal community, the tendency is towards finding people on whether they are from Koonibba on the West Coast, to Point Pearce on Yorke Peninsula, to Point McLeay, or as they prefer to call it Raukkan. So, the roles of these Aboriginal settlements - they are still Aboriginal settlements today, but the roles of these former missions are very important in terms of how Aboriginal people identify
themselves today. So that is some indication as to the
fact that the modern Nunga community, which encompasses
all of those southern Aboriginal groups, is largely
built upon pre-European elements of Aboriginal culture.
But, very heavily influenced by basically the race
relations then between them; that is, the Aboriginal
people and the colonisers, the Europeans. In order to
provide a working model of contemporary Aboriginal
culture is not sufficient to look back into the
pre-European Aboriginal literature and just extrapolate
the differences. There is a lot that the contemporary
Aboriginal community have developed which would neither
be regarded as assimilated European forms, nor could it
be regarded as pre-European forms. We are looking at
a group of people who have developed on their own line
and are not on some point between a pre-European past
and a European present.
Q. I think that you personally take the view - and I'm
refering to your Time Line and the history that you set
out that there were two significant events in the
history of the Ngarrindjeri people which has really
affected their cultural development.
A. Yes.
Q. Those two things are: the arrival of the white sealers
and the arrival of small pox.
CONTINUED
Q. Why, of the sorry tale that is set out in your Time Line, do you see those two events as significant.
A. I will take the arrival of small pox first. There are various estimates of the effect that small pox had on South-Eastern Australian Aboriginal populations, but even fairly conservative estimates would place that a majority of Aboriginal people suffered and possibly died as a result of two waves of small pox which occurred prior to official settlement in 1836. There are many reports from colonists and early recorders of Aboriginal culture, that record right from the Darling, right along the river, Adelaide, through the South-East into Western Victoria, that Aboriginal people who survived, that were middle aged people by this stage, still bore the marks of the small pox on their faces and bodies, and that the majority of their groups had died through the result of those two waves. I suppose it is really only a guess what effect that would have had on Aboriginal society, but it is possible that quite a few of the ceremonies, and certainly the mourning rituals, were truncated in order to get by such a large number of people dying in a fairly short space of time. Yes, my statement is in terms of the perceived impact that that had on the society in terms of what Aboriginal people thought, backed up by quite a few references in the easterly ethnography. When the sealers arrived, and they appear to have arrived during roughly one of the waves of small pox, they tended to set up their sealing and, in some cases, whaling depots on islands off the mainland, so that they could avoid reprisals from mainland Aboriginal groups. But it has been recorded, particularly for the Tasmanian end of that sort of Southern Australian coastline, that the effects of sealers forcibly abducting Aboriginal women from the coastal regions led to many groups virtually disappearing altogether. So the sealers taking away women of reproductive age from
coastal communities certainly had a major impact on the
demography of the coastal region.
Q. Is it the case that many of the present Ngarrindjeri
people are descended from sealers and whalers.
A. Yes. It is difficult to know exactly how many, but with
the Wilson family and their connections to virtually
every other Ngarrindjeri family, we could be looking at
a thousand or more Ngarrindjeri people who are descended
from one of two sealers, Wilkins or Wilson.
Q. In 1830 or thereabouts, your research has thrown up how
many sealers and whalers that were working in the
southern waters near the Lower River Murray.
A. If we take in the whole region of Southern South
Australia, it is estimated - if we count the Aboriginal
wives, who were a major labour force for the sealers as
well - there has been an estimate of roughly 200. Other
people have suggested that is probably a bit
extravagant, but it does indicate, nonetheless, that
there were quite a large number of boats moving up and
down the coast from Tasmania, right through to the Great
Australian Bight and beyond.
Q. So the reason why you see those two events, apart from
what has been called `Europeanisation', as significant,
is because of its devastating impact on the culture of
Ngarrindjeri people. Is that correct.
A. Yes. We have got a tendency of describing pre-European
culture - as the Berndts do with the title of their
book, `Yaraldi: A World That Was' - in terms of
Aboriginal culture as it was recorded when the
missionaries, in particular the German missionaries,
arrived after official settlement. But what I am saying
is that there have been several major effects resulting
from European settlement that had occurred before those
earlier ethnographers - that is, the missionaries - had
arrived in South Australia. So really, in order - or
strictly speaking, to speak of pre-European culture, we
would have to rely more on archaeology and less on
social anthropology. So I have discussed that in the
thesis and I have tended to, rather than talk about
pre-European culture, which Aboriginal people and others
would often describe as traditional - I have tended to
talk about Aboriginal culture in the earliest years of
European settlement.
Q. So, is this the point then: that, even by the time of
the missionaries coming on the scene, as it were, that
the exploration events, including two catastrophes of
the arrival of the white sealers and the small pox, had
left Ngarrindjeri culture, to some extent, a crumbling
culture.
A. It certainly had a significant effect. `Crumbling'
would imply some judgment on what invasions, you know,
or truncations that the survivors would have done in
order to keep things going, so I perhaps would not
describe it as a `crumbling' culture, more as a culture
that was reeling from the shocks of the first events
brought on by European colonisation.
Q. Would you describe it as a transitional culture.
A. I guess all culture is transitional, in that culture is
constantly changing, including our own culture. But
there are certain events that bring upon change much
quicker, and I think, in one context, it is acceptable
to describe it as a transitional culture, yes.
Q. With that in mind, can you compare the situation of the
Ngarrindjeri people with, say, the people in the Central
or Western Deserts of Australia.
A. Yes. The frontier, in terms of European intrusion into
Australia in relation to the Lower Murray, is really
around the turn of the century, the 18th into the 19th
century - and Encounter Bay, which is in the Lower
Murray - and when Adelaide was set up in 1836, the
frontier then started moving sort of inland. In terms
of places like the North-West of South Australia, the
frontier, in terms of European intrusion, didn't arrive
until the 1930s. By the 1930s the ways that the
Europeans were reacting to Aboriginal affairs had changed somewhat. So you can sort of build up a model that explains why some communities have been able to maintain their ritual religious life relatively intact, whereas other communities, which have been heavily missionised through that earlier period, because there the frontier passed them much earlier that is why that aspect of their life has suffered more.

Q. Are there then Aboriginal people, say in the North-West area, who have not long ago existed in the hunting/gathering mode of pre-European culture.

A. That's correct.

Q. But that was a long-gone situation as far as the Ngarrindjeri people were concerned.

A. That's right. Around the turn of the century there were still one or two Aboriginal groups living a modified hunting/gathering existence down the southern end of the Coorong, but they were roped into the mission around about 1911, and due to the change in legislation.

Q. On p.3, the second paragraph of your report, you make the point that I made earlier to you, that the Ngarrindjeri culture today is a group of mission cultures, that, together, comprise what is known as the Nunga Community.

A. I was going to say, Ngarrindjeri culture, to some extent, equals Raukkan or Point McLeay culture. They are not completely the same thing, but can often be used interchangeably in the same context. So if we look at Nunga culture as being all of the Aboriginal people who could - well, who have sections of their community living in Adelaide, then we would be looking at people from Koonibba, Point Pearce and Point McLeay mainly, and they are people that have been living in Adelaide at least since the Second World War and, collectively, tend to call themselves Nungas. Ngarrindjeri culture is something that has existed perhaps earlier, but it is an identity that is still being shaped and modified through the central role of the Point McLeay Mission.
Q. So the conclusion you make there about that, bears on this question in what way.
A. In this report, I summarise what was the state of play in terms of what we were able - Steve Hemming and I, that is - to discuss with Aboriginal people through the 1980s, and there was a general pattern of that repeated everywhere, and that is that, although certain myths - there was a lot of knowledge about the big sort of dreaming epics, there seems to be virtually no information available, and, even when elderly people did know of the story, they didn't know too many of the sites. So, in my thesis, I basically explain that by being - through the rather restricted relationship that Aboriginal people have with the landscape being based on missions rather than, you know, moving across the landscape and relating with various mythological sites. So the model of having a - or looking at a contemporary culture as one based around these important places in the history of Aboriginal people over the past 200 years is quite important in determining the contemporary world view.

Q. So you are really saying to us that we should recognise, in looking at Aboriginal culture, the corrupting influences of European exploration and what followed.
A. I would perhaps hesitate towards calling it 'corrupting'. I would be trying to look at it in more anthropological and less emotive terms. But there has certainly been, you know, very heavy influences on Aboriginal culture and restrictions - very heavy restrictions on the passing down of information and the transference of that knowledge from roughly 1800 through to the present, 1995.

Q. Just so I can clarify what you are saying. You are saying that culture is dynamic and it evolves with changing circumstances.
A. Yes, constantly changing.
Q. Can I take you to the topic of the Ngurunderi epic. The museum have a display which features the Ngurunderi epic, isn't that the case.
A. That's correct.
Q. I think you, predominantly, Stephen Hemming and Philip Jones, worked on that display and exhibition, did you not.
A. Yes. Steve Hemming was the curator, who had the task of putting it together. Philip Jones was employed as a research officer initially, to compile a bibliography and to conduct the research that would be needed to start building cases. My initial role was as a museum assistant, and then as a biologist, who could add something in terms of the more hunting and gathering interaction with a physical environment than of the display.
Q. I think the museum produced a film which is a distillation, is it not, of aspects of the differing stories about Ngurunderi. Is that correct.
A. Yes. There is no one correct version of Ngurunderi. I have written a paper, which is referred to in my report, which will appear later this year in the museum records, whereby I put forward a great number of these variations and account for them in terms of the socio-political environment which produced all the variations. In terms of the display upstairs, one version had to be picked if we were to produce a film, and that is mainly the Berndt version, which was taken from a publication which was a precursor of 'Yaraldi: A World That Was', a publication from 1940. Steve Hemming consulted with the Aboriginal community and there were a couple of points which needed modification in order to reflect the contemporary situation and on how people viewed the past. But perhaps Steve would be a better one to flesh that in.
But, in a sense, the Ngurunderi video is a version that has come about in its own right for the display. It is
not a version that would, in its totality, have been
received from an Aboriginal person.

MR SMITH: If now is an appropriate time, I would
like to show that video and seek to tender it.

VIDEO SHOWN

CONTINUED
Q. The landscape in and about Hindmarsh Island and the Coorong and the Murray Mouth, in relation to Ngurunderi and the literature, is there any analogy drawn, or is there -

A. Ngurunderi's activities, or his perceived activities in the Dreamtime were considered by Aboriginal people to have created at least some of the major landscape features throughout the Murray basin. In terms of the actual course of the river, that was through chasing a cod. The lake already appears, in terms of the main versions of Ngurunderi, to have existed, although other versions state that the lakes were created by Ngurunderi to drown his two wives. But then there are other versions of the Ngurunderi story where the wives are the pages. So, there is almost an endless series of variation in terms of how the various bits of landscape were formed. There are a few of the place names, particularly around the Murray Mouth, which refer to body parts. And it is published, in the Berndt book, that the Younghusband Peninsula and the Sir Richard Peninsula are the legs of Ngurunderi. So, we do see aspects of Ngurunderi in the landscape.

MR SMITH: Madam Commissioner, we have now reached the stage, in Dr Clarke's evidence, where he is to deal with women's business.

COMSR: You say it is to do with women's business. It is not to deal with it in such a way that all males at the bench need to leave, I take it?

MR SMITH: It is to deal with in a way in which s.35 comes into play. I could perhaps indicate that this section of the evidence would be substantially over by the luncheon adjournment.

COMSR: I understand there is some problem with the air conditioning in this room. It is not working,
at the present time, so perhaps it is an appropriate
stage to indicate that only those persons whom I
specifically permit to be present, during this part of
the evidence, are to remain in the room. Those persons
who have not been permitted to remain, must leave.
Perhaps I will adjourn, while that is taking place,
for a few minutes, and let a little bit of air into the
room.
ADJOURNED 12.13 P.M.
RESUMING 12.25 P.M.

COMSR: I just want to ensure that there is no-one in the hearing room, other than those persons who have been permitted to remain. That is, parties and their legal representatives and hearing staff and reporters and counsel assisting and the witnesses.

Are there any other persons, in any other category?

MR SMITH: Yes, there is one other category. That is, there are two anthropologists, in addition, who have given an undertaking, who have a vigorous interest in the anthropological evidence, and those two people are here.

COMSR: Who are they?

MR SMITH: Rod Lucas and Philip Jones.

COMSR: Are they to be witnesses before the Commission?

MR SMITH: At least one of them is.

COMSR: In the event, which one are we talking about?

MR SMITH: Philip Jones is the next witness. And Mr Rod Lucas reported in the early years of the Hindmarsh Island development’s development. And his report is going to be one of the exhibits. And he may well be giving evidence, but that is a matter that is still, shall I say, a contingency. He should be entitled to be here, because this material may be canvassed with him.

COMSR: I will permit the two anthropologists to be present during this private hearing of the Commission.

WITNESS P.A. CLARKE, EXAMINATION BY MR SMITH CONTINUING IN PRIVATE

Q. Can I take you to p.3 of your report, Exhibit 1, under the heading `Women's Business'. First of all, can I just take you away from the document, for a moment, and take you to the Berndts; Ronald and Katherine Berndt: Their work `Yaraldi. A world That Was', is that regarded, at least until your thesis happened on the
scene, as the seminal work on the Ngarrindjeri people.

Q. It certainly is an intensely detailed, what would you
call it, ethnographic work, is that fair.

A. Yes, it is a social anthropologist's description of what
they considered to be a - well, it is really a language
group-cum-tribe, but a complete society.

COMSR: I just wonder, before we proceed, if I
shouldn't formally make a direction in connection with
the hearing.

I think I will formally do so.

I direct that all persons, except the witness, legal
advisers, Inquiry attendants and the transcript
reporters leave the Inquiry and that this evidence be
heard in private. Parties given leave to remain can
remain and also the two named anthropologists.

I further direct that copies of the transcript of
this private part of the hearing not be given to, nor
made available for inspection by any person, other than
the legal representatives of the persons given permission
to remain in the hearing.

Does that cover the situation?

MR SMITH: Yes, I was going to say, it doesn't
cover Michael Sykes, but he is here.

Q. I appreciate that the answer to this question may
require a degree of interpretation, but, if it doesn't,
say so. The Berndts' work does not refer to any secret
sacred women's business, does it.

A. No.

Q. Ronald and Katherine Berndt worked extensively around
wider Australia in addition to the Lower River Murray
region, did they not.

A. That's correct.

Q. The work they did in the Lower River Murray with Albert
Karloan and Pinkie Mack was done in the 1940s, wasn't
it.
A. That's right. And there were two main field work periods around the 1940s, yes.
Q. Would you spell Karloan for the reporters.

Q. Could you tell us a bit about the Berndts. First of all, did you know them, did you come to meet them.
A. Yes. Professor Berndt mainly, sometimes with his wife Dr Katherine Berndt. They used to pass through Adelaide on their way back to their home in Perth. So, from about the early to mid-1980s right up to, well, both of their deaths within the last few years, they were visitors perhaps once, sometimes twice, a year at the South Australian Museum. Professor Berndt in particular was keen to keep up a rapport with us because he, after 40-odd years of recording this Lower Murray material, this Yaraldi material, he was starting to work on it in the 1980s and he was quite enthusiastic about it and he knew of our interests in the Lower Murray as well. So, in our area of the anthropology division, we knew the Berndts reasonably well.

Q. They had no children.
A. That's correct, as far as I know.

Q. They were both dedicated anthropologists.
A. Yes. Anthropology was obviously their whole life. They were a team. Professor Berndt would often tackle the parts of Aboriginal culture that were seen as more in the male realm and Katherine Berndt worked often with Aboriginal women by themselves, but she was particularly interested in the female realm. And I think it's fair to say that her writings and body of writings on, you know, that female realm of Aboriginal culture would place her as one of the first feminist anthropologists in Australia working with Aboriginal culture.

Q. They worked intensely in the Lower River Murray area in the '40s.
A. That's right.

Q. You said that they have recently died, deceased, both of them.
A. Yes.
Q. In the time between then and, say, the publication of
their work in 1993, did they continue to work throughout
Australia.
A. After working the Lower Murray, they did intensive field
work in the west coast Ooldea region of Central
Australia, Arnhem Land, a bit of work in the Kimberlies.
I know that there are at least some publications in
relation to parts of Queensland - although I don't think
that was a stronger area - and a little bit of work in
Melanesia.
Q. Your position is that in their work `Yaraldi, A World
That Was', there is no reference to sacred women's
business.
A. That's correct.
Q. Were they keen publishers of the work.
A. Yes.
Q. They did.
A. Yes. Their publication record is immense. They were
probably the only anthropologists in Australia who had
this cross-the-continent overview of the Aboriginal
culture as it was in its more pre-European state, due to
the fact that they were working often in sort of
frontier fringe situations, but also working with the
people like Karloan and Pinkie Mack, whom they
considered to be part of what they call a `memory
culture'; that is, people who had lots of records in
their head which related to a much earlier period.
Their field work was very intensive right across
Australia, and particularly with Katherine Berndt there
was a sort of sharp focus on her work on things that, in
a general broad sense, we would call using Aboriginal/
English women's business.
Q. Their publications in relation to their works in other
areas of Australia, did any of those publications allude
to secret business of any sort.
A. Well, Professor Berndt put out an iconography series
where he looked at religion cycles and the role of
mythological and sacred sites. That is a fairly major
time of his work. The work of Katherine Berndt was in
the area of woman’s knowledge of ritual religion and
sacred sites is quite significant as well, and there are
in her material for parts of Australia, such as Central
Australia, she does afford a status of secret sacred at
least to some of that knowledge.

Q. Is this the position: That in some of the published
works of the Berndts in respect of other areas of
research in Australia, they have alluded to secret
sacred business.

A. That's right. In their book `The Yaraldi, A World That
Was', they make a broad comparison with other regions
where they worked. And it was fairly obvious to them -
and they used to say this during their visits and they
have said it in print as well - that it was really the
Central Australian Western Desert Region which, in their
opinion, there was a perception of a sharp distinction
between things that are secret sacred men's business and
secret sacred women's business. But, in much of the
rest of Australia, particularly coastal regions like
parts of Arnhem Land and Melville and Bathurst Islands
on the coast of Northern Australia, where they did a lot
of work, and in particular the Lower Murray, they
couldn't find evidence for that same gender distinction.

And Tononkinson, in his foreword to `The Yaraldi, A
World That Was', also comments on that overview that the
Berndts used to give in relation to the role of men and
women in Aboriginal society across Australia.

Q. In your report, Exhibit 1, there is a discussion of
women’s business on the one hand and secret and/or
sacred women’s business on the other.

A. Yes.

Q. Is it important to make a distinction in the context of
this inquiry between those concepts.

A. Well, the term `secret sacred women’s business' is
really a description of what has been put forward by the
supporters of the secret sacred women's business as it relates to the Hindmarsh Island side of the issue. There is certainly no argument from me that women's business exists in all Aboriginal cultures across Australia. 'Women's business' is a realm of knowledge often relating to dance and ritual that was, you know, largely held by Aboriginal people, by Aboriginal women as distinct from Aboriginal men. Where I differ from the other people who support the women's business on Hindmarsh Island is the fact that, whether it was secret sacred women's business - and secret sacred women's business would go against the ethnography from the Lower Murray which affords men's business and women's business on equal footing and, therefore, so much interconnection, that it can't really be separated out.

Q. I was asking you whether the Berndts had, in contrast to what they published about the Lower River Murray in other areas, published material alluding to secret sacred business, and your answer that was, yes, they have.

A. Yes.

Q. No doubt you take some solace then from the absence of that in the Berndts book in relation to the Lower River Murray in terms of your views about it.

A. Yes. A lot could be said about what the Berndts did say or didn't say. They were the people who recorded that material in the 1940s. They had a specific interest in the role of gender in that society. So, their own conclusions, or their own material must be considered to be more significant than perhaps a reappraisal of that same material in the present light without there being significant additional material collected from the same time as the Berndts.

Q. Whilst we have been pre-occupied with the Berndts, there are numerous other ethnographers who have done work in that area; isn't that the case.

A. Yes. There are several periods of ethnographic work in
the Lower Murray. If we broaden ethnographic work to include any historical record of Aboriginal people and their customs and beliefs in that region, we are looking at what I've argued is the most heavily recorded area in southern Australia, or certainly southeastern Australia. So, the Lower Murray Region is not a gap in the literature from that point of view. In terms of ethnography, a single study of an Aboriginal culture is, in its totality, a single Aboriginal culture. There are very few studies anywhere in southern Australia - and the Berndts work is significant outside the Lower Murray Region for that very reason.

Q. You have done some work, some anthropological work, as it were, in Australia yourself.
A. That's right. It's more - I've worked in virtually all parts of South Australia in relation to my current role in terms of identifying and recording men's secret sacred objects. I have been having to deal with Aboriginal councils right across Australia, and in many cases not just dealing with senior male elders from those groups who have come down to Adelaide, but also to visit them out in their homelands. So, I've been - that's the role in terms of my overall career, the role of compiling this massive inventory of secret sacred objects. I have visited places such as the Kimberlies and the Macdonnell Ranges and Musgrave Ranges over the last few years.

Q. There has been reporting by scholars, such as yourself, in the course of time as to the topic of secret sacred women's business in published materials, has there not.
A. What published materials are you referring to?
Q. I am thinking of Keen, for instance. He has published material concerning secret sacred matters.
A. Yes. His volume, which I think was published last year, is specifically focused upon the role of sacred knowledge in the Yolngu area of the Arnhem Land. There have been - that's the volume that Chris Anderson's
editing at the moment which has got a number of articles from anthropologists who have been working with land councils and working with the secret sacred objects repatriation issues over the last few years. So, there will be another book very soon that will have a number of papers that deal with the role of sacred objects and secret sacred information in relation to Aboriginal society.

Q. What of the suggestion, however, that male anthropologists and male publishers of information such as this wouldn’t be likely to hear about it.

A. I think the overall pictures is far more complex in saying yes or no to that question. For instance, some of our most important secret sacred men's objects that we have in the Museum were collected by female anthropologists, particularly during the 1930s through to the 1950s. For the purposes of the men who gave those objects up, it's quite clear that they regarded the European women as basically being without gender. So, there are examples, such as that, that show that it's not just a simple case of saying 'Well, white female anthropologists work with Aboriginal women and male white anthropologists work with Aboriginal men'. It's far more complicated than that. Sometimes a person's life history might be important in terms of, as an anthropologist, how they will be received by a community. Certainly, you know, having children and being middle-aged is probably going to give someone better access than being a young honours, or - well, a young graduate student in anthropology. It's a lot more complicated than providing a simple model. In terms of - I mean, a big part of this issue is whether men could even have knowledge that the secret sacred women's business could even exist. There's - one opinion is that it could exist without men knowing. If that was the case, then we are not looking at secret sacred
women's business, but secret secret sacred women's
business. And I would argue that knowledge, regardless
of what gender, if it's considered to be secret sacred,
could not exist in a complete vacuum. There would have
to be enough knowledge at least of its existence and its
general structure in order for those who are to lie as
outsiders to be able to know where the boundaries of
that knowledge would lie in order not to transgress what
the rules associated with that knowledge may be.

Q. For instance, if I could give a lay example: If there
was a sacred object in a cave.

A. The women would have to know that that cave, or perhaps
that side of the hill was to be kept away from. I know
from field work up in the northwest of South Australia,
that some of the most important sites are right on the
edge of major settlements, and because there's general
knowledge, even with children, about keeping away from
such places and even the broadest terms why they have to
keep away from those places, then, you know, things
proceed reasonably well. There is no sort of constant
break in the rules or trespass onto those areas. And
people who don't have, you know, rights to see or
observe objects, there is no threat of those people
coming in contact with such material. So, there has to
be at least the barest knowledge of the secret sacred
business which has a gender which may be ascribed to.
There has to be the most basic information available in
order to define insider versus outsider, and it's that
aspect of sacred, secret sacred application that Keen
talks about in his publication.

Q. In any event, is it not the case that of all the
chronicles of ethnographic data, not Lower River Murray,
there are some women who have published.
A. Yes. I have already mentioned how it is a very heavily worked area, but there are women who have worked in the region. Alison Harvey is quite significant in the context of this Commission. She worked in the late 30s with people like Pinkie Mack in the sort of Wellington area. There is Katherine Berndt, of course, whose work we have already talked about. There are people such as geographers, who have worked from the late 50s through to the 80s, people such as Faye Gale and some of her female students, Jane Jacobs and Joy Wundersitz, being people who have had some exposure to Lower Murray culture. There are also people that are a bit hidden, I suppose, like Dorothy Tindale, who was often used by Norman B. Tindale, curator of the museum, that is significant, if not in his own right. Dorothy was often used to get information from Aboriginal women that Norman B. Tindale felt that he perhaps couldn't ask, or it would constitute what, in Aboriginal English would be called, shame. So there are women who have worked in the Lower Murray region as ethnographers.

Q. You would expect at least to have reported the fact of, if not the contents of any secret sacred 'women's business'.

A. Yes. I would expect that, even if information was not forthcoming, that the reasons why that information wasn't given, would have been spelt out and, in particular, would have appeared in Katherine Berndt's material because of her special interest in that area. But I would also expect to see it in at least some of the other work of those female anthropologists and geologists.

Q. From a lay reader's point of view, there appears, in the Berndt work at least, to be quite some intimate detail about matters of sexuality, birthing, menstruation and that sort of thing.

A. Yes. There is quite a bit of detail in there, and it appears to have been gathered from both Albert Karloa
and Pinkie Mack. So even the source of the information wasn't restricted to either male or female, and it doesn't appear to have been a major impediment to be either male or female in terms of being the recorder.

Q. Can you offer any explanation, as an anthropologist, for the distinction that you make the point about between, say, the desert Aboriginal people from North-West and Central Australia, as opposed to the people of the Lower River Murray.

A. It is difficult to come up with a definitive answer, but it may - some of the factors that would need to be taken into consideration I think would be the social organisation of the Western Desert, Central Australian Region being quite a bit different from most other regions, particularly temperate regions such as South-Eastern Australia. It has been suggested by more than one archaeologist that the Murray Darling Basin, not just the Lower Murray but extended right through to New South Wales, was the area where there was the highest density of Aboriginal people living before any European settlement. So we could be looking, in the Lower Murray, of quite a large population that didn't move about to the same degree as the Western Desert, Central Australian groups had to. Their social organisation, therefore, and the way that their society was organised, would naturally have been along quite different lines. So it may not have been possible to have areas of knowledge and areas of the landscape that had very sharp determinations or divisions on exactly who could go there. We are looking at a landscape that was full of people basically.

Q. And sedentary or, at least, to some extent -

A. Approaching the sedentary, but, you know, use of the landscape, yes.

ADJOURNED 1.00 P.M.
RESUMING 2.20 P.M.

COMSR: Perhaps, I had just better formally get
an acknowledgment that there is no-one present in this
room that has not been permitted by me to be present.

You cannot see anyone, Mr Smith, who is not?

MR SMITH: No. I have had a look, there is nobody.

I tender Philip Clarke's thesis. I do not expect you to read it, but I tender it only on the basis of establishing his expertise and scholarship in this area.

EXHIBIT 3 Thesis by Philip Alan Clarke's tendered by Mr Smith. Admitted.

Q. You have in front of you Exhibit 1, your report. Could you go to p.4, the last paragraph. Under the heading 'Initiation' you make the point first that women are very much a part of the decision-making life of the Ngarrindjeri people. Is that correct.

A. That's correct.

Q. You then move on to talk about initiations of both boys and girls, and make the point that it was centred around a certain mythology. Would you spell that and pronounce it for us.


Q. Why is that significant.

A. What it does show is that, although males and females were initiated at different times, they were still put through the same myth cycle. They were considered, both males and females, to be actors, if you like, in the same myth. So what it does do is show that, in the area of initiation, it is the same basic information which - cultural information that is being used to initiate people.

Q. Does that diverge in any way from your experience of other Aboriginal groups in other parts of Australia.

A. Female initiations are not that well recorded in other regions, but I am sure that I could find examples where there were differences between males and females, but I am not putting myself forward as an expert in female initiation anywhere else.
Q. I produce to you the Berndts work. Can I take you to
the foreword of Professor Tonkinson. First of all, in
relation to him, I imagine he is but can you tell us
whether or not it is true, he is a person of standing in
the anthropological community.
A. He is a significant anthropologist, both in terms of his
academic standing as Professor of Anthropology at the
University of Western Australian, but also as someone
who has done field work. Although I have read some of
his material, I am not intimate with it. But, from my
understanding, he has done extensive field work in the
northern parts of Western Australian, and probably other
areas as well.
Q. You have read the Berndt work, of course.
A. Yes, I have gone through it several times, albeit for
different reasons, but I am reasonably familiar with it.
Q. The foreword is unusually long and detailed, am I
correct.
A. Yes. I think the reason for that is the fact that this
body of work, in the way it is structured - I am talking
about chapters and the way the information is parcelled
up - would be considered a bit old fashioned in terms of
what anthropologists are writing now. So Tonkinson had
to put this ethnography into context. The Berndts kept
to the structure because their 1940s data presumably was
organised along these lines. They didn't want to
significantly re-work it. They did want to sort of
bring their better overview of - a more informed
overview of Australia in, but, at the same time, they
didn't want to re-work all their data, so they have
stuck to this sort of structure, and Tonkinson comments
on that on a few issues. Tonkinson thought it was worth
drawing out a couple of points from it. Gender
relations is one example. But there are other things
that Tonkinson obviously thought needed to be said in
order to put the work into context.
Q. Can I take you to page XXII of the foreword.
A. Yes.

Q. You see at about point 6 of the page, Tonkinson makes the point `Certainly no evidence exists that there was any issue of secret sacred versus public sacred or non-sacred material that could conceivably have divided senior Yaraldi people in terms of whether or not to divulge such information to outsiders.'

A. Yes, I see that.

Q. That is your finding as well from the material.

A. Yes, it does back up my statements.

Q. As we come over to the end of your treatment of `women's business', about p.5, para.2, you set out there your conclusion, do you not, from all documented evidence available.

A. That's correct.

Q. Just to complete that for the record `From all documented evidence available, the only possible conclusion to draw is that there was no secret sacred aspects of the ritual and ceremony of Ngarrindjeri women in the pre-European period that could be described as women's business.' Then at the end of the next paragraph, you conclude by saying `Women's business, as a secret sacred realm of Ngarrindjeri culture, originates from people in the urban context of the 1990s'.

A. That's correct.

Q. Is it your position then that any notion of secret sacred women's business is simply not documented in the wealth of material available in this area.

A. That's right.

Q. And ought to be documented, if it existed.

A. It ought to be documented. What is documented are separate roles of women to do with dance and ritual. I mean, there are documents, particularly from outside of the immediate Lower Murray area and further up the river, that demonstrate that women, in ceremonies, had particular roles, and they were, for those phases of
those ceremonies, different, but that is an enormous
leap away from elevating that type of separateness to
completely secret sacred realm of female knowledge.

Q. I suppose it is one thing to say it is not documented
and, therefore, it doesn't exist. Can you deal with it
on a higher plain by saying: What is documented gives
you an indication of what should or should not exist.
Do you know what I mean by that.

A. What is documented is that, in the Lower Murray region,
women and men had a great deal of overlapping knowledge
on most parts - or much of their culture, and in the
part of their culture that related to what we perhaps
call religion, to do with their beliefs about the cosmos
and dreaming, senior women were certainly authorities
and had the status of being knowledgeable people in
relation to that knowledge and to initiations, but there
appears to be restrictions for younger people about
whether they could have that knowledge. So what we are
really seeing is, rather than there being a strong
gender division of that knowledge, being one where age
would have been more decisive on what knowledge people
had. So the indications are here, not just from the
Berndts' material, but also backed up, as is stated in
my report, from other sources such as Tindale, that the
picture that we get from all of that is that women and

men, in terms of their knowledge of the dreaming, had
pretty much the same knowledge. There may have been, as
Berndt suggests in a couple of points in the book, some
aspects of certain dreamings that women would perhaps
give more emphasis to. There were parts of the myth and
knowledge of the dreaming that women would have a
varying account of, so they would be giving different
emphasis to different parts of that dreaming. But there
is no evidence that suggests a body of knowledge that
women had that men didn't. And I would say the same
would happen the other way, that because senior women
were involved, to a large degree, in the critical life
of a Ngarrindjeri society, including the initiations and
that level of activity, that you couldn't really argue
that there would be a separate secret sacred men's
business in the Lower Murray. So what has to be - you
know, for there to be another conclusion other than
that, then there really needs to be some hard evidence,
not evidence that cannot really be taken into
consideration, I believe, as evidence that just shows
some separation between what men do and women do, either
to do with birthing, menstruation or hunting. There has
to be more than just separation. There has to be more
than just separation in activities. A lot of the
factors that led to women having separate activities to
men are more or less explained by Aboriginal - in this
case Ngarrindjeri beliefs - about contamination. I am
referring specifically here to blood, but it also goes
for pregnant women. There was a prohibition commonly
called taboo in Ngarrindjeri society, and it seems to
have been widespread throughout at least South-Eastern
Australia, whereby women who were pregnant or who were
menstruating were not allowed to come in contact or
anywhere near water courses because it was considered a
contaminating influence on the fish in that water, and
they would be netted and speared as a consequence.
CONTINUED
As a consequence, that is an example. And there are other examples, but that is an example of a separation of activity that is not based on separate knowledge, but it is more separate practice and it is explained by their perception of the world.

Q. At Roman numeral 22 of the foreword of Berndt, I omitted to draw your attention to the last sentence, that paragraph at about .6. "All the material gathered by the Berndts, including that pertaining to sorcery, beliefs and practices, was freely available and public. Just as it had been traditionally according to the Berndts' "Yaraldi Teachers". And that is what you found, in your all researches.

A. That certainly appears to have been the case back last century when there were people still actively practising sorcery. I was certainly worried, as has already been stated, about how contemporary Ngarrindjeri people would view that, but the fact is that, as far as I know, there hasn't been any complaints about the sorcery in this book. And, so, in a sense, the contemporary situation is along the lines of as the situation last century. So obviously sorcery practices were fairly openly talked about and the informants of the Berndts didn't have any problem with talking about it. And, yet, these are practices that are attributed to killing quite a few people, even earlier this century. So that is an example of knowledge that was considered very powerful, but it was not veiled with any secrecy to any large degree. And, from the material in this book, it is clear that both men and women could be sorcerers.

MR SMITH: I tender the Berndts' work, because it is to be the subject of much examination and cross-examination.

It is `A World That Was', by Berndt and Berndt, 1993.

EXHIBIT 4 Book, `A World That Was', tendered by Mr
Q. Your report under this heading then deals with a number of headings: 'Oral History', the effect of Christianity, and a heading 'Not Known By Men?'. First of all, 'Oral History'; you there are addressing the suggestion, are you, that, notwithstanding the absence of material in the literature, could this sort of information or knowledge be exclusively the domain of oral history.

A. That question sort of raises a number of points, but, as I say in the report, oral history has this tendency of coming into direct conflict with recorded sources of history. So, by its very nature, oral history is - changes its very form virtually with every speaking of it. So, it is - although certain themes are likely to remain through several tellings of a particular story or a historical account, or post-European account, the actual stress, the meaning put into those facts and some of the outcomes are likely to change with each telling. So, there is a real problem with putting forward oral history as something that is a valid alternative to academic history. But, I mean, oral history in the way that I have used in my thesis is a cultural artefact in itself and worthy of study and it does tell a lot about the speakers of that oral history. But, as a narrative in its own right which informs people about the past, it cannot be taken as a replacement to Aboriginal history. It needs very careful use and the researcher, in this case, say, an anthropologist, would have to put a lot of effort into developing a framework in order to interpret that oral history that he or she may collect.

Q. The framework or the structure, if you like, of the culture of the Ngarrindjeri people does not leave any room, or does it, for any contention that secret sacred women's business focused in and around Hindmarsh Island and that area could possibly have missed the ethnographers and be handed down.
1 A. In my opinion, based on particularly in my field work
   and history of close interaction with Aboriginal people,
   I could would say the answer to that is, no. That I
   have been struck, while doing field work, that there are
   a number of themes that are often spoken about by
   Aboriginal people when they are talking about the past.
   And there is some consistency throughout the community,
   and that is on the basis of their shared history.
   Individuals put the stress in different ways and
   sometimes change the facts and get them the other way
   around, but you can still - almost like a mythology, you
   can still see some underlying structure there that
   relates accounts, say, on early mission history or
   shipwrecks down the Coorong, you can still see some
   overlying structure that lumps all the accounts
   together. I believe, if there was secret sacred women’s
   business relating to Hindmarsh Island, that there would
   be more indication of it. If not by myself, as a male,
   if it did have that prohibition about me, as a male,
   hearing about it, I would still have expected that there
   would be very firm evidence, from female researchers,
   who have worked in the area. And I mean actual
   contemporaneous notes from the 1960s right through to
   the present, at least stating that such knowledge
   existed, even if there was no detail. But I am not
   aware of any evidence of that kind. And, until that
   evidence has been brought out, I would say that my
   answer to that question, whether it could exist as an
   oral history independent of any record of it, I would
   say the answer is, no.

Q. You then deal with Christianity and the point you are
   addressing there is, is it, that the missionary society
   that developed, as it were, provides some sort of
   barrier for received culture. Is that the point that
   you are addressing there.

A. There is several points I have got in the ’Christianity'
   part of my report. I suppose, to start with the more
preEuropean sounding of the subject matter, I deal with
I have got here the example of preEuropean mythology.
That is of Ngurunderi, who we have already seen the
video about. That mythology having been taken by
Aboriginal people and adapted and modified into a form
of Christianity. And, by that, I mean that Ngurunderi
essentially became God, or perhaps God became
Ngurunderi. It is not a one way process. It is a
blending, you could say. But, initially at least,
Aboriginal people in the Lower Murray absorbed
Christianity as if they were absorbing a new Dreaming
and, as is often the case, they absorbed that new
Dreaming by implanting the names of ancestors from their
own Dreaming upon it. So, this is - this comes out very
strongly in the Taplin Journals. And I refer to a
Couple of entries in the Taplin Journals in this report.
But, there is even elements of it today. In this
report, I talk about a young adult who was, in this
case, female, who told me, in the 1980s - late 1980s,
that `Ngurunderi is like Jesus. God gave Ngurunderi to
the people. God spoke to the people through
Ngurunderi.' And I have got other examples there of a
syncretism of tradition, which I won't go into, but
there are other examples of mythology blending with
Christianity. I suppose the point of what you started
off with with this question was really will the
relationship of the church in the mission - and I mean,
by definition, a mission is based around a church, or
certainly the missions that were being set up in South
Australia last century. The church was - had a central
role in the community. And some of the main families
that produced people who later on main informants for
anthropologists' interview are represented in those
church records. So, the point I make here is that the
Point McLeay church, originally it was congregational;
I think sometime this century it became Salvation Army.
The church has had an impact on every Ngarrindjeri
family, in one way or another. In some families, it has been more so than others. And I refer specifically to Dulcie Wilson here, because I know that there is at least one theory that she perhaps did get this secret sacred women's business, because she was a church person. I am saying that that, from my experience and what I know of the history, her church background, wouldn't have been an impediment to her receiving this business. There are examples in Central Australia of prominent law people, as they are called, law men and women, who are considered custodians of a great number of Dreamings. They are cut throughout their country and yet they still have senior status as Christians. So, there is not a dichotomy between a believer in Aboriginal mythology and the Christian. So, I reject that outright.

Q. You then move on to deal with `Not Known By Men?', and, to some extent, you have dealt with that already, haven't you.

A. Yes.

Q. In answering other questions.

A. Yes.

Q. But could you sum up what you have said there about why it is that an answer to this question about the existence or nonexistence of secret sacred women's business is not as simple as saying `You are a man, you wouldn't know.'

A. Yes, as I was saying before, if the secret sacred women's business did exist in the Lower Murray, then there would still be enough knowledge of it, outside of the group of women who were the custodians, just to define who was an insider and who was an outsider. So, it is not - in my opinion, it is not possible that that information could have existed in a complete vacuum.

And, as I said, earlier, if it did - and I don't think it did - but it would then have to be called secret secret sacred information, but I reject that, as a
category. And I think even the - well, I know that the
Central Australian material that I am familiar with
would also reject that there would be a sort of corpus
of information that could exist in a complete vacuum.
By 'complete vacuum', I mean no knowledge whatsoever
that that secret sacred information existed.
Q. Is the other way of approaching that to do, what, to
look at the model of the culture that the ethnographers
have built up as not affording any support to even the
secret secret sacred women's business.
A. There are sort of, you know, broad models which describe
cultural trends across Australia and, in terms of the
Western Desert, the practices of subincision and
circumcision are quite important and have had an effect
on - I believe have had an effect on how those societies
in the Western Desert Central Australian region have
dealt with the secret sacred category. Areas such as
the Lower Murray and the Murray Mallee and down to the
southeast Western Victoria, that was part of Australia
which didn't have subincision circumcision. Whereas the
evidence suggests that the Adelaide-Mid North-Flinders
Ranges area did have some of these practices, but it may
have been a relatively recent movement from out of the
desert region. So, it is possible to broadly classify
societies around Australia in terms of the types of
ceremonies and whether they have initiations and what
type of initiations they are. You see a little bit of
this on Norman B. Tindale's map. I am not suggesting
the tribes are necessarily meaningful, but he does have,
on that big map that was published in 1974, he does put
in the circumcision subincision lines and it is
interesting that it is really the desert cultures that
have such practices. The coastal regions, generally,
don't. I have already mentioned the demography of
Aboriginal society that could also have had or probably
would have had a major effect on how people define
secrecy.
Q. Moving to the next heading, the passing on of the
business, you talk there of - you quote there something
obviously said by Dr Fergie like "Women's business is
stated to be "like a fission-reactor"."
A. Yes.
Q. What did you understand that to mean, having dealt with
it there.
A. I imagined that Dr Fergie was trying to make the point
that this knowledge to Ngarrindjeri women like Dr
Kartinyeri was so incredibly important to them that it
was as powerful as a nuclear generator, but it also had
the potential of destroying them. So, yes, I imagine
that is what Dr Fergie meant by using that metaphor.
Q. You then say - you move from that metaphor on to saying
that it is inconsistent with the components of the
knowledge for it to be handed down to Dr Kartinyeri,
when she was a young girl. Can you explain that to us.
A. As I have - in the next sentence, which I will probably
read out, that is probably the best way of explaining
it. I have got here 'If such business existed, it would
almost certainly have been handed on to mature
Ngarrindjeri women who have proven themselves in the
eyes of the community. In particular, senior
postmenopausal women.' If knowledge which is so
important to be compared to something like a
fission-reactor was to be handed down, it would be
handed down to someone who had proven themselves, that
they could deal with that information and could be
trusted and knew what to do with that information. I
don't believe that - I certainly know of no examples in
the literature of such important knowledge that would
have been handed on to someone who was fairly junior and
particularly back then when it has been the demography
of all small towns, I suppose, that the majority of
young people leave the region.
CONTINUED
Then, Ngarrindjeri being in that process as well, the city and other regions have been pulling people out of places like Point McLeay, you know, since the Second World War. So, it doesn't seem consistent that such important information would have been handed down to just one or two or three or, for that matter, young women who were basically just starting their life. In Central Australia, knowledge is handed down in bits and pieces and the emphasis is on the person receiving the information proving that they are worthy to receive the information and knowing how to deal with it. And it's not conceivable, in my opinion, that someone - and I believe Dr Kartinyeri's, on a couple of occasions, varied who she actually got the information from, but I believe that it's not consistent that whoever that person was would have trusted a young girl. And there were certainly many mature Ngarrindjeri women who were in middle age around at that time. It's usual that the middle-aged people in every society are the most politically active and they would have been the people who would have sought out the information if they had known it existed. The two generations involved in the passing down of this information - supposedly an elderly woman, who I don't know who that would be, and a young girl, who Dr Kartinyeri was then a young girl - those two generations, I don't think, would have been the way that the information would have been transferred. It would have had to have been transferred on to mature, probably middle-aging Ngarrindjeri women who knew the landscape, knew other myths and the like and had a world view that was, you know, worthy to hand this information down to.

Q. You make mention there that this sort of knowledge is typically stored latterally.

A. Certainly that is the case in other parts of Australia where important knowledge that may be associated with increased ceremonies - that is ceremonies that keep on
rebuilding the proproductive potential of the world in the eyes of those Aboriginal people - that that knowledge is not just handed down in one direction. That people who are often described as 'law people' have also received that information. They may not have rights to speak of it, but they receive that information. And elderly women who had that role of receiving really important information - even in the Western Desert you could have a normal line where information is transferred down and coming to an abrupt end, and yet there are people in the system who may not have rights for the information but could then speak with authority. And the information, the business, to use that Aboriginal English, could then be set back on the right track again.

Q. You then end up under that heading of 'Passing on the business' to make the point that Albert Karloan and Pinkie Mack instructed the Berndts in a last resort way.

A. Yes. Certainly the picture that the Berndts portray is that Albert, and possibly to a lesser extent Pinkie, but both of them, were very keen to record their culture. They were aware that they were the last people who had relatively intact knowledge about the pre-European culture. The Berndts also talked to a couple of other people, such as Mark Wilson, but, in terms of what the Berndts considered intact knowledge, it was Albert Karloan and Pinkie Mack. And so, you know, they were considered by the Berndts to be the most knowledgeable in form, certainly to do with the Yaraldi and of the Ngarrindjeri constellation.

Q. You move from that proposition to the proposition then of the 'Absence of a mention'.

A. Yes. The absence of at least a mention of secret sacred women's business is a very important point. I mean, there could be a lot of discussion trying to explain why Pinkie, for example, wouldn't have told Katherine. But, I mean, my trust is in that the Berndts were excellent
social anthropologists and they would have tried in
every possible way to at least map out the area, the
state of play that their informant's knowledge was at.
Although Pinkie Mack, in the 1940s, for example,
couldn't remember some of the initiation songs that were
sung 60 years ago, we cannot sort of take that fact and
then say 'She was holding back', because people do
forget things; and it is a memory culture that the
Berndts are describing. They make it quite clear that
they couldn't describe a pre-European type society and
they were describing a society from the point of view of
a handful of knowledgeable informants. So, yes.
Q. Your final paragraph is under the heading 'The invention
of tradition'. To put that in sentence, you are there
suggesting to us that secret sacred women's business has
been recently invented.
A. Yes. I mean, the term 'invention of tradition' is a
title of a book, an anthropological book, which actually
looks at changing tradition among European society. So,
I'm not suggesting that Aboriginal people are the only
people who re-invent tradition or invent totally knew
traditions. It's the fact of culture that, from time to
time, the perception of the past and, you know, the role
of the past in framing the present is going to be
massively changed. There are minor changes in culture
all the time. But there are incidents through our own
history where we have basically, as Australians for
example, re-invented our past. And I'm involved in
writing at the moment a number of papers where I'm
writing Aboriginal people back into the colonial history
of South Australia, because, through our own
re-invention of our own past, we tended to write them
out. That is an example of the types of processes I'm
talking about. There is some literature on the way that
Aboriginal people, you know, as historians come up with
explanations of events that were, you know, often
separated considerably by space and time, they
amalgamate all of these events and places into one
single narrative and place them in one part of the
landscape. I refer to a couple of papers. There is
quite a bit of literature on this. I sort of go on in
the report to put forward a possible explanation. I say
`possible' because I don't know what is inside the
sealed sections of the Fergie report. I put forward my
view of how - what I've said in terms of invention of
tradition, to a large extent, explains some of the
information that Dr Kartinyeri and others have been
giving you through the press in relation to the
mythological significance of Hindmarsh Island.

Q. You mentioned writing back into Australian or colonial
history, or Australian history, the Aboriginal role.
That's by a process of academic investigation.

A. That's right.

Q. You are not suggesting that is the case here, or are
you.

A. No. I'm saying that my own research - I'm trying to
correct what Australians have done to Aboriginal people
in the sense of writing them out of the fairly major
roles in our own, that is European Australian's,
settlement of Australia. So, I was - I may have
confused people. I was basically saying that this is an
example of how I, as an academic, as a professional
anthropologist, am trying to go against an invention of
tradition that Europeans and Australians had in relation
to how they came to a wild landscape and tamed and
settled it. Going back to my report, in terms of how
Aboriginal people often bring together all of these
events that they relate to and places they relate, this
is in the single account. The importance here is that
to Aboriginal people, these accounts have to make sense
in Ngarrindjeri history, in the case of the Lower
Murray, but it's the truth which lies in the overall
message, not the fact. So, it's for that reason that I
believe that Dr Kartinyeri does believe in the basic
account that she has to do with Hindmarsh Island. She does believe in it because of her knowledge - and it's not knowledge through, necessarily through academic history, but through her own extensive work. But, you know, it's knowledge that she's made sense of, she's worked it out and she's come up with a narrative and she's placed it in the landscape. So - but how, and this relates back to the oral history part of my testimony, how academic history is to treat that is another thing.

Q. If you were to write into Australian history the Aboriginal presence, if I can put it that way, would you be in any sense rewriting our history of Australian history.

A. Yes. I mean there are various, you know, trends in Australian history which I wouldn't, by any means, be an expert in. There has been a Manning Clarke style, basically writing the story and about the nation of Australia - and which I argue is a bit of a myth - but, in the process of doing that, being fairly selective with the information that it incorporates. And, according to, say, a post-modern feminist critique of that, he is basically replicating - not `replicating', creating a model of Australia which is overtly masculine, you know. So, it denies in many cases the role of women. But it certainly denies the role of sealers because they weren't official explorers. It denies the role of Aboriginal people who were trackers. In the case of the early phase of settlement in South Australia, they were, you know, doing a lot of the collecting food and all of that essential level of work when the first settlers arrived. What I'm doing is trying to go back and be more objective. And armed with perhaps a more informed, more critical view of what previous historians have done. I'm coming up with another story. And I suppose history will, in the
future, possibly take my accounts and modify them. That is the nature of the academic work.

Q. That is the difference between what you are doing, that is, rewriting what was Australian history by introducing the Aboriginal presence, and you say there by obtaining a more complete and accurate portrayal of what took place.

A. What I'm doing is going back through diaries of early merchants who were coming through the region, the first settlers, and using a sort of a scientific - yes, a scientific approach of what is collecting data and then building a picture from that. So, it's become abundantly clear to me that without Aboriginal people in the landscape, European settlement in South Australia could not have gone the way it did. I mean, even the location of Adelaide where we are sitting now was impacted upon through the link that the sealers had with Aboriginal women and the fact that it raised the fact that the Aboriginal people in the Peninsula were less conducive with the interaction with Europeans. Aboriginal people, through the burning regime of the landscape on the land, as distinct from Kangaroo Island, produced a sort of a much more open landscape that was suitable for grazing of stock and moving around. So, I mean, I'm sort of making lots of jumps here of the types of points that I brought out particularly in one chapter in the thesis where I argue that, you know, we have totally, in many cases, totally ignored the impact and that the pre-European population had no terms of modifying the landscape. Also, the impact of all of that upon European settlement. Also, the role of Aboriginal people in terms of showing Colonel Light where the Onkaparinga River would go, for example, and showing people where the soakages were.

Q. As I understand it, you justified what, I suppose, is rewriting the history on the basis that it's legitimate to do so from the sources which you consider are
reliable and trustworthy.
A. Yes. I have gone back and started from as close as possible from primary sources where I can't say -
Q. I appreciate that. You see nothing wrong in producing an account which was not previously there. What I mean is, you don't say that that is not a legitimate exercise.
A. Well, I think -
Q. Leaving aside for one moment what you consider to be the reliability of the background source material, you would say that there are circumstances in which it's a legitimate exercise to rewrite the culture or the history.
A. Yes. What I'm doing, I'm as much a part of that cultural process as what I'm describing in a sense. I mean, it's no accident that someone like me in the 1990s is, through my training and the influence I've had from various trends, from the sort of academic area that I'm going back and not taking as gospel certain standard histories, I am trying to come up with a more balanced approach. But I'm not arrogant enough to think that that is going to end there. I think society does have to come to terms with, you know, who it is, you know, from time to time. We are approaching another milestone and I think that is one in terms of the change in the next century and the republic and everything. People are being a lot more aggressive in challenging some of the bases upon which the Australian society is built upon, and Aboriginal people are certainly part of that process.
Q. What I'm trying to follow is: You think, as I understand it, that it's a legitimate exercise to reappraise the culture at this stage by delving into the past on settlement and what is already written, as it were, on the white culture.
CONTINUED
A. I think things should be able to be challenged at any
time. I do not hold that there is any part of
Australian society that is sacred, if you want to use
that.
Q. I appreciate that. You say you think that is legitimate
on the basis of anthropologically acceptable facts.
A. Historical.
Q. Do you rule out the possibility that it would also be
acceptable on the basis of some other approach.
A. Are you talking about an Aboriginal approach of
formulating?
Q. Yes.
A. That is a problem that I have within myself, in that,
had there not been a question to do with this Hindmarsh
Island business of: does secret sacred women's business
exist say before the 1990s, then I could quite easily
accept contemporary Aboriginal views of their past as
being real, if they believe them. So I'm not
challenging anyone's view of the past, except in the
context of: Was there secret sacred women's business
connected with Hindmarsh Island before the 1990s? I am
having to sort of step back from an anthropologist's
position, whereby everything is real and therefore
everything is unreal type position, basically the post
modern world view, which is that there is no sort of
single world view. I am having to basically become more
scientific and factual, and try and document when it was
that people came up with a new formulation. Whereas
often anthropologists would probably not be as
interested in the historical side of what they are
presented with, but be more interested in what they
could describe in the present.
Q. I just want to be sure I am following what you have had
to say concerning the formulation of 'secret women's
business' and the way in which, as I understand it, you
think modern Aboriginal women have persuaded themselves
it existed. That is, that they have gone back to the
past and obtained - and have, as it were, concentrated material from several sources and introduced it into the present.

Q. And the distinction that you see between that process and your process of righting an historical account of white culture, is that you believe in the reliability of your sources.

A. Well, in a way. Although, there is some overlap in what I would be trying to do as a white academic, and what Aboriginal people would be trying to do in terms of explaining their own contemporary situation. The reasons why I, as a white academic, am doing it are quite different, in that therefore the methodology, the tools that I use, are quite different. Normally, I wouldn't put forward my views of the past on the basis of what I had records for, to challenge what a contemporary Aboriginal person thought was the case. I would not do it. If there are Aboriginal people, and particularly if it is more than just an individual, a number of people have got a certain belief, I certainly would not go out of my way to challenge their view, but, as I said before, unfortunately, this very issue about ‘Did it exist?’ is important and, therefore, I am coming up head on with an Aboriginal interpretation. I wouldn't say, by any means, a widespread belief in the past, but at least a few women have come up with this moral. I am coming up, you know, head on with them, whereas, normally I would avoid that.

Q. Have you any experience of any other, say, Western Desert or Central Australian concept that might explain what has happened here. For instance, I have heard talk, in the context of this case, about the Seven Stars Dreaming. Does that, in your view, have any relevance to what has developed here in relation to Hindmarsh Island.
A. That is a mythology that, on the basis of what I know - and, again, I don't know what the core of the secret sacred women's business is about - but, from my knowledge, that was mythological information that was overlaid, if you like, once the basic secret sacred women's business had been formulated. There are examples, some of them documented, whereby particularly Western Desert people have used their dreamings, and they tend to use more pan-Aboriginal dreamings like the Seven Stars, but used dreamings such as that to extend their sphere of influence. I know, among anthropologists, we often describe the Pitjantjatjara as the imperialists of the Aboriginal world through this very process. So they have been increasing their sphere of influence, and they often do it through these types of issues. So there is some consistency there in terms of recent history. But if we were to go back and look at the cultural blocs, as they are referred to in my thesis, and look at the distribution of culture early last century, then it is quite clear that the Western Desert culture had only marginal influence in the sort of Flinders Ranges to Adelaide region, and no influence in terms of language or shared ceremony, or any of those sort of parameters, no influence on the Lower Murray region. So, I suppose - I was going to call it an importation of mythology, but I would argue it is really an export of mythology from the point of view of the Western Desert. It is something that has been going on for presumably hundreds of years, but in relation to Adelaide and the Lower Murray it is very recent, and in relation to Hindmarsh Island, I would say it is just a couple of years.

Q. So the Seven Stars Dreaming is some mythological women's business matter - dreaming, is it.

A. Yes, you could call it women's business, in terms of how that would be defined in the Western Desert. With all this talk of women's business, no-one has really
explained it. But in terms of Aboriginal pigeon,
'business' refers to just general ritual or ceremony.
So that 'women's business' would be ritual or ceremony,
not necessarily secret, sacred at all.

Q. Who are the appropriate custodians for knowledge such as
is contended for here, secret sacred women's knowledge -

A. Often in these situations, right across Australia, the
ultimate authorities are spoken of as being 'The old
people' and there are elements of that, from my
perception in looking through the media, in this issue,
that initially people who were active on the Hindmarsh
Island issue were active on behalf of 'The old people'.
But, as so often happens, old people are at the stage of
their life where they don't really want to be heavily
involved in such things. So there is often a little bit
of tension between older people and very politically
active middle aged people. So, although, that is an
aspect of this issue, I think that's something that you
would see in the politics of quite a few more remotely
placed Aboriginal communities around Australia.

Q. My question really was, in the context of this matter,
do you understand who the alleged custodians of the
secret sacred women's business are.

A. I have heard several reports. Did you want me to name
them?

Q. Can I suggest to you that they are suggested to be
Doreen Kartinyeri, Connie Roberts, Maggie Jacobs and
Edith Rigney, amongst others.

A. They are the names that I've heard.

Q. As opposed to Dulcie Wilson, Bertha Gollan, Rita Wilson,
Audrey Dix, Jenny Grace, Betty Tatt, Phillis Byrnes and
Margaret Lindsay. Can you help us, from your knowledge
of the family structures and genealogies of Ngarrindjeri
people whom you know, in terms of saying what group may
or may not be custodians in the way contended for.

A. I suppose if there is any pattern, it is the fact that
both camps probably don't have a pattern. The
custodians are people, although roughly of similar age -
I think Mrs Jacobs would be the oldest - they have had
quite different life histories. Mrs Jacobs, for
example, left Raukkan as a young girl and has lived a
lot of time in Darwin and, I believe, Cairns. Mrs
Roberts has spent time in fringe camps in the Lower
Murray and the latter part of her life up in the
Riverland. And Doreen, of course, leaving as a young
girlfriend, being in Adelaide and then Point Pearce.
Edi Rigney, from my knowledge - I have always known her
as someone that has either lived on Point McLeay or at
Murray Bridge. But we have got four fairly different -
at least in terms of location - life histories there.
In terms of the other women, I think they are also sort
of fairly widely spread. So, yes, I couldn't guess at
who would have more rights. I suppose -
Q. If you couldn't guess, I don't suppose it is going to
help me very much.
A. Okay, I will leave it.
Q. I produce to you a copy of the report of Dr Deane
MS PYKE: I am not sure whether my friend is about
to try to have the witness refer to that or tender it,
or what. Perhaps I will wait and hear.
MR SMITH: Simply identify it. I will mark it for
identification.
Q. You have received a copy of that document, which
purports to be a report of Dr Deane Fergie dated in July
1994, is that correct.
A. That's correct.
Q. You have looked through that, I think, haven't you.
A. Yes, I have.
Q. You have considered its contents.
A. Yes, I have.
Q. I just want you to answer this question in one line. Do you agree with that report or not.

COMSR
Q. We don't want you to go into an explanation. I think it leaves open to a yes or a no virtually.
A. I was going to - sorry, can you ask that question again?

XN
Q. It is not my place to canvass that report with you at all, but I just want you to acknowledge that you have seen it and considered it, and what is your view about it.
A. As shortly as possible, I would say -

COMSR: Is this going to -

MR SMITH: I am just going to mark that for identification.

COMSR: I know, but the witness is being invited now to a discourse on it, as it were, on the contents of it. Is that what you are -

MR SMITH: I just want the witness to say, in a short sentence, his view about the opinion. Then I am going to leave the matter.

COMSR: Whether he concurs or disagrees with the opinion?
MR SMITH: Yes.

COMSR
Q. Are you able to say whether you concur or whether you disagree, or is that not possible to do it in that way.
A. Well, I disagree with the report.

MR ABBOTT: I am concerned that we have counsel for Dr Fergie, making some assertion to you, Madam Commissioner, that we don't know this is Dr Fergie's report, and how can we prove it. Dr Fergie is represented by counsel. This document has been circulated. If there is any claim that this is not Dr Fergie's report, let it now be stated so we can get on with examining what is Dr Fergie's report.
I suggest that much time is going to be wasted if
there is some plan that this report has to be strictly
proved in some way as emanating from Dr Fergie. Dr
Fergie has been given permission to stay throughout this
examination, and I would have thought that that
permission is on the basis of at least a limited degree
of co-operation with this Commission. If that limited
degree of co-operation does not extend to acknowledging
what is plainly her own report, let us hear it.

MS PYKE: It is not for me to conduct the case of
counsel assisting. As I indicated earlier, it is not,
by any stretch, clear whether Dr Fergie will or will not
be giving evidence, for the reasons we outlined earlier
in the week. I have been given permission to -

MR ABBOTT: Is it his report or not?

MS PYKE: I haven't seen it. It has not been
distributed to me.

COMSR: This is one of the problems that seems
to be rather difficult to counter, is the suggestion
that this is a trial and that counsel assisting is
conducting a case in some way. This is, of course, an
inquiry, and my role is to obtain information.
Counsel's role in these circumstances is not that of
conducting a case against anyone. You seem to be
assuming that this is a courtroom situation in what you
are putting to me under those circumstances.

MR SMITH: If I could show Ms Pyke the report and,
if she agrees it is Dr Fergie's report, then I propose
to tender it. I am not doing this in a back-door way to
avoid calling Dr Fergie or anything like that. It is
just that there is going to be an anthropological debate
here. Dr Fergie is in the debate. Are we going to
pretend that her report doesn't exist, that it didn't
play a part in this affair? I am happy to show Ms Pyke
the report. I cannot believe she hasn't got a copy of
it.

MS PYKE: Might I say, that I understand, for
whatever reason, various documents that my friend is in
the process of tendering have been circulated to some of
us who are at the bar table, but not others. I haven't
been privy to the documents that are going to be
tendered. Clearly some others have. But my fundamental
submission would be that it would not be appropriate,
notwithstanding that this is an inquiry and not a court
of law, to tender as an exhibit, a report, if the maker
of that report is not called to give evidence.

COMSR: I am able to receive evidence. I am not
obliged to comply with the Rules of Evidence. There is
nothing inappropriate about that course being adopted
for a Commission of inquiry.

MS PYKE: If that is the plan that you are
adopting, which is that you will receive into evidence
reports, notwithstanding that the maker of the reports
may or may not be called to give evidence, I cannot make
any other submission, but I would want you to rule on
that.

CONTINUED

CONTINUED
COMSR:  No, I am in a situation where the legal representative of a person who is given leave to appear can verify whether or not it is the report. That is the situation that confronts me, at the present time.

MS PYKE:  As I say, I am not privy to the circulated material.

MR SMITH:  There was a reason for that. Ms Pyke wouldn't agree to proffer Dr Fergie voluntarily as a witness and that was the condition as to the distribution. There was no sinister reason why she didn't get the material and there isn't and anything that is tendered in the course of evidence today will be distributed to everybody, but perhaps I will show Ms Pyke a copy of the report.

MR KENNY:  If I may also say, I haven't got a copy of that report.

MR SMITH:  If it gets tendered, everyone will have a copy of it.

MS PYKE:  I might have to show it to Dr Fergie, to get her to have a look at it, which I do.

Yes, there is some difficulty about the report and markings on it that my preliminary instructions would indicate are on the -

COMSR:  I see, there are some markings added to the report, is there?

MS PYKE:  Yes.

COMSR:  Is there a clean copy available that can be handed to Dr Fergie?

MS PYKE:  Dr Fergie is just looking at it. I haven't been able to speak to her. It seems to me it can be marked for identification totally and as and when we indicate that it is indeed Dr Fergie's report as she prepared it, we will let you know.

COMSR:  Yes, but we won't be proceeding with any examination on the report before it goes in.

MR SMITH:  No, I don't intend to do that, even if it is accepted as an exhibit. It is not my role.
P.A. CLARKE XN
(CLOSED HEARING)
(SUPPRESSION ORDER LIFTED 3.8.95)

Is that not going to advance any further then?

MS PYKE: I am not going to hold things up while Dr Fergie is looking at it.

COMSR: Dr Fergie is looking at an unmarked copy, I take it, of the report?

MS PYKE: Perhaps I can indicate this: that there are markings on this document which Dr Fergie says are not hers and, of course, it doesn't have the confidential appendices. It is not complete, in that sense.

COMSR: But, apart from that, she acknowledges it as her report, is that the situation?

MS PYKE: Yes.

MR SMITH: On that basis, then, I tender the report. And I indicate that, to the extent that it has got scribbled marks on it, we should ignore those. We will replace the exhibit with a clean copy. That would be the best.

COMSR: Yes, I think that would be preferable.

MR SMITH: It is a report of Dr Fergie without any confidential appendices attached.

MR ABBOTT: It has one appendice attached. It doesn't have appendices 2 and 3.

EXHIBIT 5 Confidential report of Dr Fergie and appendix 1 tendered by Mr Smith. Admitted.

COMSR: At this stage, it has been acknowledged as Dr Fergie's report and can be - you are tendering it, at this stage, are you?

MR SMITH: Yes.

COMSR: It will be admitted and marked Exhibit 5.

MR SMITH: This next document I want to show the witness has got a special problem. It was provided to the Commission, at the moment, on the basis that it be shown only to the anthropologists: the three museum anthropologists. So that, could I - and I want to put
it to this witness. But I can't, at the moment, until
we are released from that undertaking, show it to
anybody else, other than to identify it.
I could do this probably next week, because Dr
Clarke is back next week.

COMSR: Yes, I think that it would be the
preferable course to do that. Mind you, it being marked
for identification, doesn't make it available to anybody
to look at.

MR SMITH: I would like to get it on the record, at
the moment, and have it marked.

COMSR: Yes, if it is marked for identification,
we shall ensure that it is not made available for the
perusal of anyone other than this witness.

MR SMITH: At the moment. Although, Mr Hemming and
Mr Jones have seen it.

Q. Looking at the statement - and I can identify the
statement, produced to you, which I could describe as
statement from Elizabeth Marie Fisher, which has a date
stamp on it of 31 July 1995; you have seen that
statement, this morning, I think, haven't you.
A. That's right.

Q. To the extent that you have taken on board, as it were,
the information in that statement, what effect does it
have on your opinion.

COMSR: That is not in evidence, at this stage,
is it?

MR SMITH: No, it is not in evidence yet.

COMSR: I don't want it to get in, as it were,
by a back door method through the witness.

MR SMITH: Everyone at the bar table, for the time
being, won't be able to ask questions about it until the
profferer of that document releases us from that
undertaking.

MR ABBOTT: We will agree to that. Obviously the
witness can give evidence about it, if he has taken it
MR SMITH: Yes, all the anthropologists - although with the exception of Dr Fergie and her husband Mr Lucas haven't seen this, I should say - but the three museum anthropologists were given permission, by the maker of the statement, to see it. We want to extend that, of course, because it is unsatisfactory, to that extent.

Could I have an answer from Dr Clarke?

COMSR

Q. Do you remember the question now.

A. I think it was, does it change my -

Q. Does it change anything that you have expressed an opinion on today.

A. A lot of it supports my general views of the landscape and how people were relating to it. There are a couple of statements in here that, if they - if the proof was produced, that those statements had been recorded in 1967, would - yes, I would have to modify my views. So, what I am saying is, this is a statement about evidence that, at this stage, I can't look at, so I can say that this statement supports a lot of what my views would be. But there are one or two parts of it that say there is information elsewhere and it hints at what that information is. And I would need to see that information, in order to come to some decision about what this statement is about.

MR SMITH: I won't take it any further than that.

And I just ask that be marked.

MFI 6 Statement marked 6 for identification.

MR SMITH: We have finished now the topic that was feared to be sensitive. So that the hearing room can be opened.

COMSR: Perhaps we will take a five minute break now and we will open up the hearing room then.

ADJOURNED 3.45 P.M.
RESUMING 3.55 P.M.

MR MEYER: Before my friend, Mr Smith, proceeds, in relation to the material that has been given by way of evidence since the order was made to clear the court, I make an application that, in fact, all of that material be now released. If we consider the point from where it started - and I won't go into the detail, obviously, because that would defeat the purpose of having it closed - but it started with a reference to Professor Berndt and his published works and it progressed from there and dealt with material which is in the public domain and not gained from any source which has been the subject of a dispensation pursuant to s.35. S.35 of the Aboriginal Heritage Act provides:

`Except as authorised or required by this Act, a person must not, in contravention of Aboriginal tradition, divulge information relating to an Aboriginal site, object, or remains, or Aboriginal tradition.'

The material, in respect of which evidence has been given, doesn't traverse any of the matters that are covered by s.35. In fact, it all related to published material, either by way of the publication of `A World That Was' by Berndts and Berndt, or a publicly received thesis by Dr Clarke, which has been placed before the court. The only possible area which is subject to a limitation in relation to what I will call the MFI exhibit, without disclosing it further than that, because of the limitations that were placed on it on the basis upon which it was put before the court, but, apart from that, there is no material which should not be released.

In support of the application, I say, clearly, it is in the public interest that as much of this Inquiry, this Commission, be in the public domain. And, whilst there is an obvious need to, not only comply with the relevant legislation, but a need to be properly sensitive to it also, the material that has come forth, in fact, should be released.
That is my application.

MR KENNY: As you are aware, I act for a group of Aboriginal men, in relation to this matter. I have some concerns about what my friend has said on the divulgence of that material. I mean, some of that material, I suggest, that we did talk about may well have arisen from the Berndts and Berndts report, but I would say that this Commission has no idea concerning whether that divulgence of that information is in contravention of Aboriginal tradition. I think the position, is we simply, at this stage, do not know. You will appreciate I don't have instructions in relation to that, because, actually, this is the first time that I have seen or heard it. I do, however, maintain my objection in relation to the release of that information, even without my client's instructions, because I am aware that they do have serious concerns about the matter. I think, at very least, we should perhaps have the opportunity to consider whether they believe the divulgence of that information is in contravention of Aboriginal tradition or not. Despite the fact that this perhaps is in the public domain in other places. They have serious concerns about a lot of the information. And I suggest that some of the information that we did talk about, that is contained in that book, could very easily raise concerns.

MR KENNY: I don't want to list them, in open court.

COMSR: No, certainly not. I wouldn't expect you to.

MR KENNY: I think there are some matters there that do raise some serious concerns and I would at least like to speak to my clients about it, before it is received.

COMSR: Yes, I am in the position of not being able to consider that information, in its entirety. And, of course, s.35 is designed to protect against unauthorised divulgence any information concerning
Aboriginal tradition where it is contrary to Aboriginal
tradition to do so. And any authority that I have I
consider that I should construe very strictly. So that
I have to be assured, in my own mind, that there is no
information of the sort that we have been discussing,
before I would approve the release of any of that
information. And it will take some consideration. I
don't think I am in a position, at this stage - I am not
saying it won't be done - I am just saying that I don't
consider that I am in a position, at this stage, to
confidently release the transcripts of what took place,
during the private hearing.

MR ABBOTT: We suggest, as a first step, that you
ought to ask this witness - and that is not the end of
it - this witness's view, but he ought to be asked,
without detailing it, whether there is anything that he
regards as appropriate, under s.35. And, if there is
not, that is at least a factor you can take on board.

COMSR: Yes, but counsel have put to me that he
is not in a position, as yet, to do that and he doesn't
know what the concerns are. And I certainly want to be
sure, in my own mind, that there is no problem there, Mr
Abbott, because it is my responsibility.

MR ABBOTT: Exactly, which is why I am suggesting
that each witness that gives evidence you ought to at
least make an enquiry of them, because it may assist you
in making a decision. I am suggesting an enquiry ought
to be made of this witness.

COMSR: I don't know that that is the end of
it.

MR ABBOTT: I think it specifically wouldn't be the
end of it, but at least it is a start.

COMSR: Yes, I don't think I can too hastily
accede to any such request. I am not denying it, I am
not dismissing it. I am just saying that it is a
situation that requires me to proceed with a degree of
cautions.

MR ABBOTT: Undoubtedly.
Q. Can I take you now to what we have been calling the
\textquote{}`narrative of events`.\textquote{}`

COMSR: I suppose we should note that the

inquiry has now resumed in public session.

Q. As at April 1994, Dr Doreen Kartinyeri was an employee
of the Museum, wasn't she.

A. That's right.

Q. She was employed in what capacity.

A. She was employed in the Aboriginal Family History
Project, and more specifically she was employed to do
research into Aboriginal families and publish
information she gathered into family history books.

Q. As at April 1994, she had been working at the Museum for
some time.

A. Yes, for some time. Although she had been working from
her home, she got special permission to work away from
the North Terrace site.

Q. Her home was where, as you understood it.

A. Up in the Mid North. She was at Warooka and then she
moved to Port Germein. I have never visited her in
either of those places. I'm not quite sure of her exact
movements.

Q. There was an occasion in early April 1994 when she
telephoned you at your Museum.

A. That's right.

Q. You had a conversation with her, and in relation to that

conversation supplied her with some material; is that
right.

A. That's right.

Q. Is there any documentation at all concerning either the
conversation or the supply of materials.

A. I've got a copy of the material I faxed to her. I kept
those copies because I thought that I would probably be
asked for that material from other people; and, in fact,
I did use some of that material for other people some
months later. So, I do have that material with me here
today.
Q. I'll come to that in a moment. Did you make any note either in connection with the conversation or the material and, if so, where.
A. Yes, in my normal diary, as distinct from the field notebook. In my normal diary, I made a reference that was of one word, the word 'Carter', and that word 'Carter' related to one of the photocopies. And from my memory Doreen rang me a couple of times for the material, and whilst still on the phone I just wrote that name on a certain page, a page of my diary, so I wouldn't forget to fax it to her.
Q. Have you got your diary with you.
A. Yes, I have.
Q. I want to know the date in which you wrote this entry. You did it, yes, and would you please refer to your diary.
A. Yes. Actually, the entry that I put on this page is 'Carter burial' and the date is April 12th.
Q. Of what.
Q. So, 12 April 1994 in conjunction with that entry means - what exactly is that, the day you sent the material off, is it, or the day that you got the telephone call.
A. That would have been the day that I received a telephone call and that was written down to remind me to get the materials together and send them to her.
Q. Can you throw your mind back then to the telephone conversation.
A. Yes.
Q. What was said by Dr Kartinyeri to you and what did you say in reply, as near as possible.
COMSR
Q. Could I establish something first. Do you have any record of the conversation, or are be relying on your recollection of it.
A. I don't have any notes taken on that day. I have my memory, and the faxes that I sent to her I do have.
Q. So, tell us of the conversations.

A. Well, it's very hard to reconstruct the exact words, but the gist of it was that she was, you know, desperate for information in relation to Hindmarsh Island and the environs around Hindmarsh Island, so.

Q. What did she say about that.

A. Just that she needed the information and it was in relation to the Hindmarsh Island issue. It was a general policy, you know, that we give out raw data and she's a colleague and she asked for the raw data and I undertook to send her that raw data.

Q. Was there something said about the bridge in this conversation.

A. It was in relation to the bridge, that's all that I can remember. There certainly wasn't any mythological or there was no secret sacred business, or anything like that. It was strictly she needed all the information she could get and it was in relation to stopping the Hindmarsh Island bridge.

Q. Did she say anything to you about what she had.

A. She gave me this very strong impression that she had nothing, or next to nothing. I can't remember whether she said she had little or nothing, but it was certainly the message that I got that she was starting at, you know, at the base line.

Q. What was your response to that.

A. My response was that, you know, to give her the raw data - and I discussed with her roughly, from my knowledge of the literature, what was around. And the note here `Carter burial' refers to a newspaper reference that I had only just been, some time around about then, given by a friend and colleague Robert Foster. I had that with me, as well as I had a data base that I constructed a couple of years previously as part of the build-up for writing the thesis. So, in fact, it probably would have been four or five years old, the data base, and that data base contained basic references to Taplin and
Bellchambers and basically gave a rough sketch on the few records there on the Aboriginal people connected somehow to Hindmarsh Island and the Goolwa region.

Q. You had faxed off that material to Dr Kartinyeri.
A. That's right.
Q. You have actually a copy of that material.
A. That's right. I have it with me.
Q. For anyone that wants to see it.
A. Yes.
Q. Can you produce it so that we can see what it looks like.
A. Yes.
WITNESS PRODUCES DOCUMENT
Q. That is the copy of the material that you sent off to Dr Kartinyeri.
A. That's right, yes.
EXHIBIT 7 Copy of faxes sent to Dr Kartinyeri tendered by Mr Smith. Admitted.
Q. Did you talk to Dr Kartinyeri subsequent to sending her that material.
A. In relation to the material, yes, I possibly spoke to her several times, but certainly one time sticks in my memory.
Q. Tell us what was said if it sticks in your memory.
A. Doreen was very interested in the apparent similarity between Taplin's recorded place name, Aboriginal place name for Hindmarsh Island which was `Kumarangk'. Taplin recorded that in 1874 and it apparently had the literal meaning of `The points'. However, Doreen said that it was remarkably similar to a word that she had used for `pregnant' called Kummari - I mean there could be other ways that a linguist would spell it. I was aware of that word being what some of the more older people around Point McLeay would use for `pregnant' where - I can't say the contemporary word that the young people would use today - would be Munthana. M-U-N-T-H-A-N-A - I might spell that again later. Anyway, the point is that she saw a relationship between a word that she knew
as a Ngarrindjeri word for 'pregnant' and Taplin's word for 'Hindmarsh Island'. I cautioned her from making a hasty conclusion about that by saying that, you know, from my experience, only a linguist could tell whether there was likely to be any relationship between the two words. And it's been my experience that words that often sound similar, a linguist would say are totally unrelated. And I'm not here as an expert in linguistics, although I do have expertise in Aboriginal English.

Q. The role of the Museum in terms of, say, the dispute over the bridge at Hindmarsh Island in terms of giving data out, was what exactly, as you saw it.

A. Even before the Hindmarsh Island bridge issue, it was an agreed - it was arranged through the Museum that Museum staff had to be extra careful in giving out data which could possibly lead to some form of legal action. And there have been a couple of court cases where the Museum had been basically in trouble through giving out faulty advice. There were several cautions received from the, or both the last two directors in relation to the Museum's obligations in terms of giving data. And the upshot was that we can give out raw data, that is raw in the sense of being, you know, public domain - you know, readily accessible if not from the Museum then from the Library or out from, information from the public domain, or written records which were historical in the archives and part of the State collection. But, when it came to interpreting that information, then we needed to take more caution. And, on any issue that is likely to lead to an investigation on the status of an Aboriginal site, or an object, or anything of that nature, then we always insisted that there be a formal request in writing and that that request would then be discussed with the relevant curator, head of the division, and in some cases the director. So, it was an understanding in the Museum and there are various circulars and notes and things which indicate that curators had to exercise a
fair degree of caution in terms of their relationship
with outside bodies and giving information to outside
bodies.

Q. By `curator', what does that mean it was.
A. In the Museum, curators are the people who are employed
as researchers to do research, but also to have an
opinion in certain disciplines, whereas we have other
officers who, managers and information officers, who are
able to give out information. But that would be
restricted solely to the public domain area, whereas a
curator is someone who is regarded as having a more
research-orientated, you know, higher profile role
within the Museum.

CONTINUED
Q. Can I take you to later in April. I think the anthropology division received a number of informal requests for information from the Aboriginal community at large.

A. That's right. Just phone calls.

Q. Then that was followed by specific visits by two groups of people, wasn't it.

A. Yes.

Q. Tell us of the first.

A. The museum had just received the Tindale collection, which was covered in the press, and it was seen as a great wealth of material, particularly in relation to the Lower Murray and Coorong area. For that reason, people, such as members of the Lower Murray Aboriginal Heritage Committee, were eager to tap into this resource in relation to the Hindmarsh Island Bridge issue. We had barely unpacked it - the material arrived some time in February, I believe, and we were still unpacking it through the first part of April, but the main body of journals had just been unpacked and we had several visits from Aboriginal people from all over Australia, but in particular we had a visit from the two Aboriginal men who were representing the Lower Murray Aboriginal Heritage Committee, and that was Mr Doug Milera and Mr Victor Wilson.

Q. Where was the collection at this time.

A. The collection was in an unused office out the back of the museum. It was in a high security area, but it was pretty well cramped into one office. It is an office space that is currently being used by Philip Jones.

Q. Doug Milera and Vic Wilson were shown the collection by whom.

A. By me. Just by myself.

Q. Did you speak with them during the course of doing that.

A. Yes. They obviously thought that the collection was, you know, well organised. So they came thinking that it was just a matter of pulling down a volume, you know,
entitled 'Hindmarsh Island', but they quickly saw that
the information was far more dispersed through - I am
just guessing - about 50 or 60 odd volumes of journals
and numerous books of photographs and card files and
mountains of loose paper. So they asked that I and/or
other museum people look through that collection for
anything on Hindmarsh Island, and they were also
desperate - I mean, they desperately needed cultural
information. They put it across that they needed to
stop the bridge and they needed information to stop the
bridge.

Q. It was quite apparent, was it, to you at that time that
the Aboriginal community as a whole was against the
building of the bridge.
A. At that stage, it was more just the groups that, as a
museum, we tend to interact with, like the Lower Murray
Aboriginal Heritage Group, who were against it.

Q. So I suppose you would expect those groups to be
interested in the anthropological material that was
available.
A. Yes. We had had several other similar sort of heritage
issues in relation to Granite Island and Cape Jervis,
and others. And at that stage - in the stage of this
Hindmarsh Island visit - I and the rest of the museum
were treating it in just the same way, that we had a
public collection and we would give out the information
but we wouldn't get involved, and if we were asked by
other parties for that information, that they would get
it as well.

Q. But nothing unusual that you could see in the request to
peruse the available material.
A. Not at that stage. That's right.

Q. Did you say anything to them about that request to find
something.
A. I mean, I told them that there was difficulties with the
  collection. I told them that there was secret sacred
  objects from other regions that were sketched and
  photographed in it. I wanted them to get the picture
  that it wasn't just Lower Murray material in the Tindale
  collection. I also said - and this was speaking from my
  authority of having done the thesis - that, in my
  opinion, it would be very unlikely - the Tindale
  collection, that is - to have much information on
  Hindmarsh Island in view of the bias that the literature
  has towards the Coorong and the Southern Eastern side of
  Lake Alexandrina, and also because Tindale's main
  informants being people whose main sort of country was
  peripheral to Hindmarsh Island. So I didn't want them
  to get their hopes up that there was something there. I
  said I would look through it, and I did. But, as it
  turns out, I was correct and there was very little
  information in the Tindale collection.

Q. A few days after that visit from Doug Milera and Vic
  Wilson, did you have a visit from another group of
  Ngarrindjeri people.

A. Yes. On this occasion it was Doreen - Dr Kartinyeri,
  Mrs Hilda Day and Mrs Sara Milera, three women. On this
  occasion, I had forewarning enough that they were
  coming, so I contacted Steve Hemming, who was then
  working out at the Fullarton Road annexe, I believe, to
  come in and help me out. So all five of us went into
  the room where the Tindale collection was stored.

Q. About what time. What are we talking about here. What
  time in April. Approximate date.

A. I would have to look through my notes. It was before I
  went on leave, and it was obviously after we unpacked
  the Tindale collection. It was after the Mr Milera and
  Mr Wilson visit.

Q. What notes do you need to look at just to fix that time.
  When you went on leave.

A. No, it would have been prior. Have you got the figures
  of when I went on leave? I can look them up.
Q. You have to supply them, I am afraid.

MR MEYER: I would have thought the date he went on leave would have been non-contentious. For my part, I certainly do not object to him being led on that.

Q. I think you went on leave on 15 April.

A. Yes, that is what my book says.

Q. So it is before 15 April.

A. Yes.

Q. And after the 12th, you have said.

A. Some time around about then. It is very difficult to put it at an exact date, but I have got an early and a late date as a range to give it a fix.

Q. Is the sequence of events: the telephone call from Doreen Kartinyeri, that you have told us about; some visits from Aboriginal people, but, in particular, a visit from Doug Milera and Victor Wilson.

A. That's correct.

Q. Then another visit from Ngarrindjeri people, being Doreen Kartinyeri, Hilda Day and Sara Milera.

A. That's correct.

Q. And Stephen Hemming came in from the annexe.

A. That's correct.

Q. Tell us what happened and what was said.

A. On that occasion it struck me straight away that there was a difference in the way that Doreen was talking about the Hindmarsh -

Q. I wonder if you could tell us what was said on that occasion.

A. Okay. The basis of what happened on that occasion, what was said, was along the lines that Dr Kartinyeri said that they now knew something, as Ngarrindjeri women, about the Hindmarsh Island area. It was quite clear that she wasn't going to go any further than that, but she said that they were now wanting material to back that up from the Tindale collection.
Q. She wanted to see if there was anything of relevance in that Tindale collection, did she.
A. That's right.
XN
Q. Did you assist her with that. Did anybody.
A. We had a look through a few of the volumes, steering away from ones that we thought would have some restricted material from other areas in them. So we looked at photos. While looking at those photos, Mrs Sara Milera suddenly appeared to be in a trance and said she saw something spiritual in a particular photo, but Dr Kartinyeri and Mrs Day didn't seem to be caught up in that belief. So it was basically looking through the material, and it was left with Dr Kartinyeri instructing Steve Hemming and myself, with some urgency, to go through as much of the collection as we could, looking for things to do with Hindmarsh Island and the adjacent Coorong/Goolwa region.
Q. I think you then went on leave on 15 April.
A. That's correct.
Q. And that leave, was that 15 April to 11 May.
A. Yes. I had to extend it a bit. I took leave because my wife was due to have a baby and that baby arrived some ten days late. So I was sort of tacking on as much leave as possible, but, again, that event meant that I was able to use that event to sort of fix the position of what happened earlier on in my leave.
Q. By the time you went on leave, had you searched the journals for references to Hindmarsh Island.
A. Yes, I had been completely through the journals at least twice, and parts of the journal I went back a third and a fourth time because I was following up leads relating to other projects as well. So at that stage I was probably the most familiar person in the museum on the journals relating to the southern regions of South Australia.
Q. I think whilst you were at home on leave you had a telephone call from one of your colleagues at the museum.
A. Yes, Steve Hemming rang me. It was during the day. It was early in my leave. As I have said, I know that because I was caught up in other events later on and didn't have any contact with the museum. He rang up early during my leave and requested that I give him, over the phone, all of the information I had on Hindmarsh Island and the related areas.
Q. At that time it was the case, wasn't it, that Dr Kartinyeri had been sent, by you, all the relevant historical data from your thesis material.
A. That's correct.
Q. That is already Exhibit 7. So what was your response then to Mr Hemming.
A. I questioned why he needed that information, because Doreen already had it, and in response to that he said that he was assisting Dr Kartinyeri in interpreting that material. So my interpretation of that was that -
Q. Don't tell us what you thought about that.
A. I complied with his request.
Q. How did you do that.
A. The phone was in my living room and the computer was in the other end of the house, so I had to boot up that computer, get into the data base, call up the records, scribble down the information on scraps of paper, and go back to the phone and give that information to Steve over the phone.
He was particularly interested in page numbers of books.
He had a rough idea of where much of the information
was, but he needed it quickly and he knew, of course,
that I had this data base.
MR KENNY: Before we finish today, the witness has
referred to his diary, on a number of occasions, for the
purpose of fixing dates.
I am wondering if my friend was going to tender
that?
MR SMITH: I can hold it. I wasn't going to tender
it.
COMSR: You would like an opportunity to peruse
it?
MR KENNY: Certainly.
MR SMITH: Why don't we just mark it, for the
moment?
MR KENNY: I would be happy with that. I would
just like to make sure there is access.
MFI 8 Witness's diary marked 8 for
identification.
MR ABBOTT: I take it he will only be allowed to
examine the relevant entries? He may not want his
diary -
COMSR: No, Mr Smith will be able to go through
with the witness and mark the relevant passages.
ADJOURNED 4.37 P.M. TO THURSDAY, 3 AUGUST 1995 AT 10 A.M.
COMMR STEVENS

ROYAL COMMISSION INTO THE HINDMARSH ISLAND BRIDGE

THURSDAY, 3 AUGUST 1995

RESUMING 10.33 A.M.

MR KENNY: Before we start this morning, I don't want to go into great detail, but I didn't note my objection to the tender yesterday of Dr Fergie's report. I want to perhaps adopt the submissions made by Griffiths when he was here -

COMMR: I will deal with that later. There is another issue I wish to deal with at this time. Counsel assisting the Commission have advised me that there have been grave concerns expressed by the women who are prepared to come forward and have co-operated to date with the Commission, for which I give them full credit. I am concerned about statements made in open hearing and in press releases to the media which have intimidated these women and have been contemptuous to the Commission itself.

Additionally, the Commission has made every effort to resolve the issue of the fears that a curse has been placed on this hearing and the Commission itself. A request for reassurance has met with no co-operation from those representing the women concerned. It is a serious issue for the women who feel under threat.

In order to address these serious matters, I propose to adjourn the hearing this morning until 2.15 p.m. when a statement will be made by me concerning these matters.

MR SMITH: Before you leave, Madam Commissioner, I ask you to dispose of one outstanding matter which was left over from yesterday, and that is the question of the release of the evidence taken in camera from Dr Philip Clarke and his report Exhibit 1. It is my advice to you, based on the anthropological advice to the
Commission and concurred with by Miss Francis Nelson for
Steven Hemming, who is also an anthropologist, that the
evidence is not capable of being regarded as in breach
of s.35 of the Aboriginal Heritage Act, and so can be
divulged.

MR KENNY: I have objected to this material being
released yesterday. I have obtained brief instructions
from my client broadly outlining the evidence - not in
any detail I might add. He hasn't signed the
undertaking as he is not here in Adelaide and not able
to do so. I can assure you that they consider that the
material that was discussed in camera yesterday did, in
our opinion, concern Aboriginal tradition, their
tradition.

MR ABBOTT: How can it be their opinion if you
haven't talked to them?

MR KENNY: In that case, I seek that this material
be withheld from release until I have had the
opportunity to obtain the necessary releases and show
them copies and take detailed instructions from them in
relation to it. It is a serious concern. They are very
concerned that this discussion or that discussion was
about their traditions and that they believe it's
improper that that be discussed in open forum. Even
that sort of material in general is, some may say is,
and they have very serious concerns about it.

COMSR: This can be quickly disposed of by
recalling the witness briefly to the stand and obtaining
from him his opinion as to whether or not these matters
are already in the public arena.

MR KENNY: If I may submit, that is not the
problem. A lot of that material, I concede, is in the
public arena. That was released, I say, in the public
arena at a time when they did not have the powers they
do today to prevent that release and they are most
concerned that it not be released. It is not a question
of whether it is already in the public arena - I agree a
lot of it is - but the point is it is still their belief
that that material should not be discussed openly and in public. I'm not saying that it is not already in the public arena or not available for those who wish to go and look. They believe that this Commission should not be party to release this information as it is offensive to them.

MR SMITH: I call Dr Philip Clarke.

MS NELSON: Before Dr Clarke gives his evidence, I want to make my position clear, if I may. Mr Smith raised the issue with me and I said that in my opinion, as a matter of law, I felt that the matters discussed yesterday were in the public domain and that the release would not contravene s.35. I simply don't want it to be interpreted as my client having expressed that opinion. That is my opinion, not his.
WITNESS P.A. CLARKE CONTINUING

EXAMINATION BY MR SMITH

Q. I remind you that you are still on oath. You heard the discussion that has passed concerning whether or not the contents of your evidence yesterday taken in camera and that part of your report or statement of evidence, Exhibit 1, has the potential or contravenes the provisions of s.35 of the Aboriginal Heritage Act and, in particular, involves a divulgence which is in contravention of Aboriginal tradition. Could you proffer your advice to the Commission about whether there is any such divulgence.

A. It's my opinion that there is nothing in what I said yesterday that would contravene s.35.

Q. Your witness statement or report Exhibit 1.

A. There is nothing there that I would consider would contravene s.35.

COMSR

Q. I take it from that these are matters are already in the public arena and would not be contrary to Aboriginal tradition to divulge them.

A. That's correct.

MR KENNY: I seek to ask the witness a couple of short questions. About this matter only.

MR ABBOTT: On what instructions? Does he give an undertaking to give evidence?

COMSR: I think it is a matter for me to determine this. I have to satisfy myself whether or not the authority that has been given to me under s.35 necessarily comes into play. On what has been put to me and on my reading of the evidence, I can see nothing in the publication of what would contravene s.35. I propose, therefore, to release that evidence.

MR KENNY: I ask that you note my client's objection to that and also note that my request is that you conduct a fuller inquiry in relation to whether or not it is contrary to Aboriginal tradition not to release the information. We have here one witness whom
I have sought to cross-examine about those matters and I have been prevented from doing so, so there has really been only one side of the evidence presented in relation to the release of the material. On that basis, I make my objection.

MR SMITH: Could I add only perhaps the release of the transcript of evidence from yesterday because this witness has not yet finished his evidence and it would be premature to release Exhibit 1.

COMSR: I release the transcript of this witness's evidence taken during the private hearing yesterday.

MR SMITH: And Dr Fergie's report still remains suppressed?

COMSR: Yes. I'm only releasing the transcript of evidence and not the exhibit that attaches to that evidence at this stage. As I indicated, unless there is any further matter, I will be adjourning until 2.15 this afternoon, at which time I'll make a statement concerning those issues which I indicated are of particular concern to the Aboriginal women who have been prepared to co-operate with the work of this Commission.

ADJOURNED 10.44 A.M.
RESUMING 2.20 P.M.

COMSR: I consider it appropriate at this
ejuncture, in the light of recent events, to clarify a
number of issues. I said on 24 July 1995 that my
intention was to demonstrate the readiness of this
Commission to listen to the concerns of all persons
involved in the issues before it who might appear before
this Commission.

Thereafter, I have attempted to conduct the
Commission in the spirit of encouragement to all persons
to come forward to present evidence before it, knowing
of the tensions within the Aboriginal community. In
such a climate, the suggestion of coercion would appear
to be counterproductive.

In the result, unfortunately, rather than evidence
being proffered to the Commission, there have instead
been statements made both inside and outside the
Commission which have undermined the work of this
Commission and have, I have been informed, had the
effect that they have intimidated those who are prepared
to come before the Commission to give evidence.

I wish to make it clear that I propose to continue
the work of this Commission, unless, of course, some
legal restraint is imposed, and not to be diverted by
actions outside the Commission by parties who have
chosen to withdraw from the Commission.

On the opening day I courteously allowed the legal
representative of a group of Aboriginal women to make a
statement, and I also met informally with a large group
of Aboriginal women to view two items, at her request.
This latitude was to demonstrate the willingness of the
Commission to hear what the concerns of this group were.

Unfortunately, this courtesy resulted in fears that
both this hearing room and the Commission were cursed.
The very real concerns that there was a curse cannot
lightly be dismissed. If it is of concern to potential
Aboriginal witnesses, then it is of concern to this
Commission.
In order to dispel those fears for prospective Aboriginal witnesses, counsel assisting wrote to the legal representative, asking her to get instructions as to whether or not those fears were unfounded. No proper response, either to allay those fears or to confirm them, has been forthcoming.

I have instructed counsel assisting to pursue the matter vigorously. I understand that those fears of a curse persist. Therefore, this morning, I have made arrangements to provide an alternative hearing room for any Aboriginal witness who feels threatened by those rumours. I can assure anyone who feels so affected that they need not give their evidence in this hearing room.

Statements have been made outside this Commission, asserting that the inquiry will be divisive and that the process is adversarial. I have attempted to emphasize that the Royal Commission will hear from any person who chooses to give evidence, relevant to its Terms of Reference, whether such evidence supports or refutes such allegations of fabrication.

Those who have already indicated their willingness to participate can only be applauded. Given the tensions within the Aboriginal community, I can appreciate the pressure their decision has caused them and will no doubt continue to cause them.

I deplore that continuing statements have been made to the media suggesting that the Commission is unlawful before that issue has been resolved in the proper forum, that is, in the Supreme Court. An inference might be drawn that it is intended to discourage people coming forward to give evidence. I am most concerned to hear that it is having that effect on Mr Abbott's clients.

And, if that should continue, then I will take steps to counter it. The Commission encourages people to come forward. It will consider all evidence impartially.

I mention another matter. It now appears from the response given to the Commission by Ms Layton QC, that the confidential envelopes will not be provided to the
Commission. I can make it clear that I do not intend to compel witnesses to disclose the contents of the envelopes. I do not consider that it is necessary for me to view those envelopes consistent with the Terms of Reference. That material can, in my view, be obtained from other sources, such as anthropological sources; statements made to others, and given in evidence; and from individuals such as Mrs Betty Fisher. It is from those sources that it appears to the Commission that it is not necessary that any coercive steps be taken, even if it were possible to do so, to obtain access to the contents of those secret envelopes. I do not wish to add anything further to that.
WITNESS P.A. CLARKE, EXAMINATION BY MR SMITH CONTINUING

Q. Dr Clarke, we had reached the stage yesterday where you were telling us of certain events that you observed taking place at the museum, and we had reached about mid May of 1994, after you had provided some data to Mr Hemming on the telephone whilst on leave.

A. That's correct.

Q. I think you came to know, in about mid May of 1994, that a letter had been sent from the museum to the Federal Minister, Mr Tickner. Is that correct.

A. That's correct.

Q. I think at about this time you had conversations with your colleague, Mr Stephen Hemming, concerning the Hindmarsh Island issue; is that not so.

A. Yes. I had several conversations with him, one of which would have been shortly after I came back from leave in mid May of 1994.

Q. Was the topic of the letter to Minister Tickner one item of conversation upon your return.

A. Yes.

Q. Can you tell us, so far as you can remember, what was said between you and Mr Hemming about the letter to the Minister.

A. The gist of that part of our conversation was that Steve considered that he was merely acting as a servant and that he wasn't composing the letter, but just simply typing it out for Dr Kartinyeri.

Q. Was there conversation about the topic of the validity of the women's business.

A. Yes, there was.

Q. What was said.

MS NELSON: If my friend is leaving the topic of the letter, I note that the question he put to the witness was `Did you become aware that a letter had been sent from the museum to the Minister' and the witness said `Yes'. It is not for me to know whether there was more than one letter, but it is clear, as the questioning has gone on, that my learned friend, Mr Smith, is referring
to a letter sent by Dr Kartinyeri to the Minister, and that letter did not emanate from the museum. I think that should be clarified because, as it stands, it is not correct.

MR ABBOTT: It is a fax from the museum. It did emanate from there.

MS NELSON: I don't know where it was faxed from, but it is not a letter from the museum.

COMSR: Rather than counsel debate the issue, we will have the matter canvassed by the evidence.

Q. Just to make it clear, the question of the letter that went to the Minister, you were not present when such a letter was composed, were you.

A. No, I was not present.

Q. You learned about such a letter being composed by speaking to somebody else.

A. That's right.

Q. Who was it you spoke to. Don't tell us the conversation, but to whom did you speak.

A. Mrs Margaret Amon.

Q. She is the anthropology clerical officer, is that correct.

A. That's correct.

Q. Have you, yourself, seen that letter.

A. I've recently seen a copy.

Q. But only recently.

A. Only recently.

Q. I am not leading this as to the truth of it, but what did you understand, in other words, what was in fact told to you by Mrs Amon, about the letter.

A. The subject matter of the letter was unclear to me. The fact that Margaret Amon told me -

OBJECTION Ms Nelson objects on the grounds of hearsay and that Mrs Amon is not to be called as witness.

MR SMITH INDICATES MRS AMON IS TO BE CALLED

XN
Q. Tell us what Mrs Amon said to you about the letter.
A. It was the issue of the involvement of Steve Hemming in supporting the writing -

OBJECTION Ms Nelson objects.
A. No, this is what I was told, that Steve Hemming actively supported the writing of the letter.

Q. Did Mrs Amon tell you when it was that the letter was prepared in the museum, in relation to your conversation.
A. In relation to the conversation, it was days before the conversation.
Q. That became the topic of conversation between you and Mr Hemming.
A. That's correct.
Q. Could you then, please, tell us what was said between you and Hemming about that topic.
A. The gist of that conversation was that Steve Hemming agreed with my model of 'Invention of tradition' to the point that there was some of the reporting of the women's business, he agreed, was a recent invention of tradition. However, they were my words 'Invention of tradition'. I was referring to anthropological writing on the topic and 'The invention of tradition', as I said yesterday, is a title of a book. Steve Hemming said that he was familiar with that writing and he agreed that it explained some of the women's business. However, he made the point that Margaret Jacobs - or Auntie Maggie to him - and Mrs Connie Roberts, knew something, and, on the basis that there was some truth in it, he was supporting the issue overall.

Q. I just want to clarify something, because when you use words such as 'Invention of tradition', that might sound
like a manufacture of it. Whereas, as I understand you, this was significant in anthropological terms rather than a suggestion that someone has done something.

A. It is referring to a cultural process whereby events are reshaped, the perception of the past is reshaped to make a new sense of the present. So it is - in cultural terms, it is a manufacture.

Q. Can you throw your mind back to the conversation on the topic of the validity of the women's business, and give us the words, as near as possible, that were exchanged between you and Mr Hemming, rather than drifting into a summary on them or a commentary on them. The gist of the words.

COMSR

Q. Can you remember what he said to you and you said to him, in other words.

XN

Q. Or the gist of it.

A. Well, that Auntie Maggie and Auntie Connie can remember something, and because of that, he - that is Steve Hemming - believed that there was at least some basis to women's business in relation to Hindmarsh Island.

Q. Going back to a stage earlier than that, the topic must have been introduced between you, wasn't it.

A. Yes.

Q. Can I take you back to that earlier part of the conversation. What was said.

A. We were talking in general terms about museum involvement in issues such as the Hindmarsh Island debate.

Q. And there was some talk on the topic of the invention of tradition between you and him.

A. That's right.

Q. And at some stage it got to mentioning Auntie Maggie and Auntie Connie.

A. That's right.

Q. I want you to tell us the gist of what preceded that.
In this particular conversation, which is the one that happened soon after coming back from leave, we were talking about museum involvement in the Hindmarsh Island issue. I had the view that we had a role simply as giving out raw data, that is public domain information. Mr Hemming, however, had views that he, in particular, was justified in being more active than that.

Q. So there was something in the nature of an academic dispute between you as to your roles, or your professional roles, was there.

A. Yes, yes.

Q. Then the topic of the women's business, or the validity of it, arose.

A. Yes, and because - and I stress they were my words that I put to him 'Invention of tradition' - through him agreeing that that model did partly explain women's business on Hindmarsh Island, on an academic level we were at least partially in agreement. However, the difference between his academic position on the issue and mine was that he still believed that there was some core truth to women's business as it was being put forward by Dr Kartinyeri and others.

Q. Was the topic of stopping the bridge the subject of that discussion.

A. Only in that it was something that meant that the museum had to be very careful in being involved with. Again, it goes back to my earlier point that we were talking about the museum's role in that debate and any other debate along similar lines involving Aboriginal interests - Aboriginal contemporary interests in parts of the landscape.
Q. You became aware, I think, that, on 9 July 1994, there
was a ban placed on construction of the bridge, for 25
years.
A. That's right.
Q. At least by then it was clear that the issue was no
longer just a local Aboriginal heritage matter.
A. That's right. That event signalled to me that
ultimately something like a core challenge, a
Commission, or some more serious activity than the
normal was going to happen.
Q. I think you had a telephone conversation with Dr Deane
Fergie, about this time, is that correct.
A. Yes, I have made a note in my notebook and the date on
that note is 11 July 1994.
Q. You refreshed your memory, as to the date, by looking in
your notebook, did you.
A. That's correct.
Q. Is that the diary that has been tendered, or been marked
for identification.
A. No, it is my professional field notebook.
Q. Do you have that with you.
A. Yes, I do.
Q. Could you produce that.
COMSR: Mr Smith, there is one aspect of
concern: we are not intruding into any area that is
covered by the Terms of Reference, are we?
MR SMITH: Nothing that touches on problems with
s.35, do you mean?
COMSR: No, I just want to clarify, before we go
any further, that nothing that is being traversed here
could be seen to have any possibility of prejudicing any
Federal proceedings?
MR SMITH: No.
Q. Do you have your note - your original notebook.
A. I have the original and a photocopy.
MR SMITH: I will just pause, for a moment, and
show that to my learned friends.
Q. When did you make a note of that conversation.
A. That would have been later on the day of the conversation.
Q. At the time you made that note, were the facts of that conversation, that is, what was said between you and Dr Fergie, fresh in your memory.
A. That's right.
Q. Does your note accurately reflect the conversation.
A. My note is a broad overview of that conversation. The conversation between Dr Fergie and I probably lasted a half an hour or more. My note was just a very broad summary of that conversation.
Q. I want to ask you now to relate to the Commission that conversation, as near as possible, in sequence. Do you ask Madam Commissioner's permission to refresh your memory from that note, in order to give that evidence.
A. I would like to have it in front of me, yes, just to refresh my memory.
MR SMITH: Subject to any questions on the voir dire, I propose to.
COMSR: Are there any questions on the voir dire?
MS PYKE ON VOIR DIRE
MS PYKE: I would simply ask this: I know that the suggestion is from the witness that he made the notes on that - on the day of the conversation with Dr Fergie.
A. That's right.
MS PYKE
Q. Whilst the conversation was still fresh in your memory.
A. That's correct.
Q. I note that your notes don't purport to actually record the conversation.
A. Yes, the notes are - were written for my benefit, in order of reminding me that I had a conversation and the day that I had that conversation.
Q. But they don't in anyway purport to be details of the
A. That's right. Had I written down the detail, it would have taken more than just a few minutes that it did happen in order for me to note the fact the conversation took place. I was becoming more interested in the issue and was starting to take more attention - pay more attention to the media exposure. And I was starting, in the notebook, to write down various facts that may give some indication to me what the cultural information that was being put across was all about. I was not writing a record that I considered to be - which would eventually be used in a Commission or a court.

Q. So, in fact, your notes don't record the conversation, as opposed to a general summary.

A. Yes, it is a general summary. It is not a detailed record of a phone conversation.

Q. Because, in fact, it is not even a summary of the conversation, as such. It is your interpretation of the conversation; if I can put it that way.

A. That is a fair way of putting it.

MS PYKE: Yes, I object to the witness referring to his notes, in those circumstances.

MR SMITH: It is a relatively contemporaneous record of the conversation, albeit in summary form. It is appropriate that the witness be, in order to give his evidence about the conversation, able to refresh his memory, when he needs to, from the summary.

COMSR: I haven’t seen the book.

It is a record that a conversation took place, I understand, on that day, and the topics of conversation?

MR SMITH: I will ask the witness.

Q. Is it the case, that the various topics discussed, or at least some of them are canvassed in the note.

A. At least some of them. Others, because it was a - I wouldn't say heated, but it was a vigorous discussion
between Dr Fergie and I, other aspects of that
conversation are ones that are very clear in my mind,
even today.
MS PYKE: I still continue my objection. It
doesn't purport to be the conversation as opposed to the
witness's views of matters.
COMSR: In view of the fact that the witness is
claiming to have a very clear recollection of it -
MR SMITH: Let's forge on with the conversation and
see how we go.
XN
Q. Just put the notebook aside then, for the moment; first
of all, it was on the phone in your office, was it.
A. No, I was in another office. The phone rang and I
simply answered it. It was actually the phone of Mrs
Kate Allport, a colleague at the museum. I answered her
phone and it was Deane - Dr Fergie on the other end of
that phone.
Q. Does at least the date in your - it is your journal,
Isn't it.
A. That's right.
Q. Does that correctly record the date of the conversation.
A. That's right.
MR SMITH: I take it you have no objection to the
witness referring to it, to give us the dates?
COMSR: For the purposes of telling us the date,
no.
XN
Q. Can you give us the date.
Q. Can you take it slowly as you like; tell us what was
said in the conversation.
A. That was the first conversation that I had had with Dr
Fergie on any aspect of the Hindmarsh Island issue. I
put it to her that I thought that it was actually a poor
claim; that I didn't believe in the existence of the
women's business, as it had been - could be gleaned from
the media. So, that was the - that was, sort of, the
opening part of the conversation.

Q. Interrupting you there; were you aware, at that time, that Dr Fergie was involved, if I can use that word.

A. My memory of exactly when I heard that Dr Fergie was involved is not that clear to me. But I believe that it was some days before that conversation.

Q. That you learnt that.

A. That I learnt that Dr Fergie was involved.

Q. What then was said between you: you made your position clear about women's business.

A. Yes, I gave her reasons, you know, based on my own knowledge of the ethnography; my own field work:

 Reasons which I considered meant that there could not be women's business, as had been reported in the media.

MS PYKE: This is purportedly the conversation.

Perhaps if we can get it into the I said/she said?

A. Okay. However, Dr Fergie believed that -

COMSR

Q. Did she say something.

A. Yes, okay. Dr Fergie - first of all, I put to Dr Fergie a similar explanation that I had already put to Mr Steve Hemming, and that was talking, once again, about invention of tradition.

MS PYKE: Again, can we try and have the conversation, as it unfolded?

COMSR

Q. Yes, are you able to put it `I said', `she said', in that form.

A. I will try. I said that the women's business, as it relates to Hindmarsh Island, was an invention of tradition. Dr Fergie conceded that -

Q. What did she say.

A. She said that it was a possibility that some aspects of the women's business were an invention of tradition, but she said that she was aware of the literature that I was referring to. However, she said that she believed that there was still some basis to the women's business. She also considered, she said, that she had 35 women who
believed in it. Therefore, it had a validity that she, as an anthropologist, had to recognise. I argued and said to her that nothing like the women's business had been recorded in the literature, the ethnographic and historic literature, relating to the Lower Murray area. She said that she would have expected that it would have been. She had the view that not much work had been done in the region. I argued that it is a very heavily worked region and I offered the names of Meyer, Taplin, Brown, Tindale, Berndt. She came back with the fact that none of those people - and, in particular, I also had mentioned Allison Harvey and a few women who had worked in the region - she came back with the statement that, in her opinion, they hadn't been working in the feminist anthropological tradition and, therefore, she didn't consider that she needed to refer to those works in any major way in order to do the work that she was or had just done in relation to women's business on Hindmarsh Island.

Q. Was there conversation between the two of you about confrontational issues and that sort of thing.
A. Yes, in part of the conversation, when we were talking about invention of tradition, it was - I put forward the view that -

MS PYKE: Again, can we have 'I said'?
A. I said that it was my opinion that, although identity building and changing culture does take place, that I was not comfortable that it was coming about through a development, basically a development issue. She came back with the comment that this type of identity building often does occur in such confrontational issues as a part of the process of confrontation over such things as development sites. So she was still adhering to her position that she was working on, in her opinion, an authentic tradition.

Q. Apart from women's business, was there talk between you
about women's issues.

A. We never got to the point in the discussion of defining secret sacred women's business, or women's business, although I had put forward a model of the Central Australian influence upon Doreen Kartinyeri and mentioned to her the influences that Doreen had on her through her extensive connections with people from the Ooldea west coast region of South Australia. She dismissed that view that there was a Central Australian influence involved. And my reason for introducing that fact, and I told Deane, was that it was my opinion that the definition that Doreen was using of women's business was an importation from Central Australia. She rejected that idea.

Q. So, again, there was a difference of professional opinion, was there.

A. We had a - yes, a difference. It was a professional difference, yes.

Q. Was there a discussion about the topic of consultation and the breadth of consultation.

A. Yes, I was trying to get as much information out of her in terms of who were the 35 women and who they represented and I offered a number of names to her, as a way of trying to find out who the 35 women that she had just spoken of to me were. And I offered some names, a couple of which, from memory, she confirmed were there. Others she couldn't remember.
Q. Was there also any conversation between you about methodology, anthropological methodology, in terms of -
A. I've already mentioned the part of the conversation where we were talking about other people who had worked in the area. She told me that, you know, she - it wasn't important to her work to do the level of historical work that I was suggesting.

Q. In connection with methodology, was the topic of broad consultation discussed.
A. I offered a few names to her of people that I considered, through my field work, would be considered by other Ngarrindjeri people to be knowledgeable on things to do with mythological and what is often described as `old people's culture', the culture of the old people.

Q. What was her response to that.
A. There was - from memory, there was no response one way or another.

Q. What names did you provide, do you remember.
A. I remember a few of the names. The name of one person would have been the person in the Commission we are calling the daughter of Pinkie Mack. Another name I offered was Dulcie Wilson, another name was Bertha Gollan, and I would be guessing if I added other names to that list.

Q. Do your notes record the names.
A. No, they don't.

Q. Did Dr Fergie respond to you with any names.
A. No. I was - well, in the sense that I was exploring who the main women were, I receive names such as Maggie Jacobs and Connie Roberts and Doreen, of course - and other names weren't given. She obviously didn't have the list in front of her and she was not expecting to speak to me.

Q. Can you remember then anything else that was spoken of between you on this topic.
A. As I'm sitting here, no.
Q. If you were to look at your notes that we have had a
discussion about, would that help you or at least alert
you to any other topics that you haven't mentioned.
A. I will have a quick look.

Q. Don't do that yet, not yet. But can you tell me whether
that may refresh your memory as to other topics at
least.
A. It might.

Q. So, do you ask Madam Commissioner's permission to refer
to your notes just for that purpose; that is, to remind
you if there are any other topics noted that you haven't
explored.
A. All right.

MS PYKE: I maintain my objection and I might ask
a question.

MS PYKE ON VOIR DIRE
Q. Have you recently looked at those notes.
A. I haven't looked at them probably for a week or more.

MS PYKE: I maintain my objection.

MR ABBOTT ON VOIR DIRE
Q. You have now exhausted your memory of topics that you
questioned in your discussion with Dr Fergie and that is
why want to refresh your memory at present.
A. That's correct.

Q. As I understand your notes, they contain if not word for
word, then at least a number of topics that you noted
down at or about the time of your discussions with Dr
Fergie.
A. That's correct.

Q. It's those list of topics that you now want to refer to
for the purpose of refreshing your memory.
A. That's correct.

MR ABBOTT: I submit that he ought to be allowed.
COMSR: The witness may look at his notes simply
for the purpose of refreshing his memory as to this
topic. Mr Clarke, you have leave to refer to your
notes.
PERMISSION TO REFER TO NOTES
Q. Have a quiet look through them. Perhaps if I give you a hand. First of all, is there a mention of `court' as a topic.
A. Yes, there is mention of a `court'.
Q. Tell us what was said between you about that.
A. Just that it was expected that there would be - am I allowed to look at my notebook again?

Q. I understand your notebook only assists you to this extent - and I may be wrong as I haven't seen it - that it refreshed your memory as to the topic, but not the content of the conversation.
A. That's right.
Q. There is a note in your notebook, isn't there, about the topic of `court'.
A. Yes.
Q. There is a note, albeit in summary form, of what was said by Dr Fergie about that, isn't there.
A. That's right.
Q. Do you ask Madam Commissioner's permission just to look at the note to refresh your memory as to what she said, albeit that you recorded it in a summary form about `court'.
A. Okay.
Q. Do you.
A. Yes.

PERMISSION TO REFER TO NOTES
COMSR: Again, subject to the same query that I made before, Mr Smith, we are not in any danger in pursuing this line of prejudicing anything in the Federal Court proceedings?
MR SMITH: I do hope not.
COMSR: I think there had better be more than `hope not'.
MR SMITH: All we are doing is traversing the subject matter. If anyone wants to contend to the
contrary, we are doing no more than that. This does not encroach on any of the subject matter of the Federal Court hearing because the Federal Court hearing was to do with the administrative efficacy of the exercise of power of the Minister. The question of the anthropological support for women's business, secret sacred women's business, was not at the heart of anything that went on in the Federal Court.

Q. Can you tell us what was said between you and Dr Fergie about the question of "court".
A. Yes. Dr Fergie was concerned that the matter was going to end up in court.

OBJECTION Ms Pyke objects to the witness not giving the actual conversation had.

WITNESS: Can I read it out?

Q. That is to refresh your memory, and I take it that that is half the conversation, that is what Dr Fergie had to say.
A. That's right. She was concerned that the matter -
Q. Did she say something.
A. Yes. She said that she was concerned that the Hindmarsh Island Bridge matter was going to end up in court: Chapmans versus the Government.

Q. Was there any conversation about the question of sites.
A. Yes.

MS NELSON: I wonder whether we are not perhaps now getting into an area that could conceivably offend against s.35? I'm looking at Dr Clarke's statement and, on the face of it, it seems to me that there is at least an argument that this particular issue may well fall within the ambit of that section.

COMSR: If it does, as I have indicated, I intend to err on the side of caution.

MR SMITH: I think we can leave that until the end rather than to do anything drastic at the moment and I will withdraw the question for the time being.
QUESTION WITHDRAWN

COMSR: I should explain that if it does, there
is an absolute prohibition, as it were, on the
divulgence of that information except to persons whom
are permitted to be in the court hearing. So that I
would have no authority to permit that to be canvassed
at this stage in the court.

Q. You have told us of the question of the discussion
between you about the re-invention of tradition. There
was, was there not, a discussion on the topic of the
definition of tradition as you were discussing it with
her.

A. Yes.

Q. What was said about that.

A. I was - I was talking about problems. I said there were
problems with the definition of tradition. Essentially,
there's tradition that is spoken of particularly by
Aboriginal people, but others in general, as if it's a
40,000 years of continuous history, and then there's
tradition that is of more recent origin and constantly
changing.

MR SMITH: There is a potential area there, but I
think I'll come back to that on another occasion with Dr
Clarke with some other topics in the same area which I
will canvas with him. Therefore, drastic measures such
as closing the court won't be necessary.

Q. Apart from further refreshment of memory from your
notes, is there nothing more you can remember about that
conversation.

A. If the topic of sites is to be picked up later on, then
the answer is no. There is nothing else at this stage
that I can remember.

Q. I think in all the stages of the Hindmarsh Island
dispute, as you knew it, you were not consulted by any
person in relation to the development; that is, the
developments on Hindmarsh Island itself and the
construction of the bridge.
A. If you are talking about the whole issue from its very origins, I was consulted probably circa 1990 by Rod Lucas. Around about that time, Suzie Hutchins, who was in the Aboriginal Heritage Branch, had also contacted me about development issues on Hindmarsh Island in a general sense. They were official to the extent that they had approached the Museum and they were working in an official capacity and requiring data from someone in the Museum with that expertise. In terms of the more recent part of the Hindmarsh Island, Hindmarsh Island issue, there were no official attempts or requests for information from people acting in an official capacity.

Q. Save for the visits that you have told us about yesterday from Aboriginal groups.
A. Yes. Although they were somewhat informal, there was never any paperwork. After the - after July of that year, there was an approach by Dr Neale Draper.

Q. That was to you personally, was it.
A. As an - initially, a phone call to our head of division, a phone call from Dr Draper to the head of division, Philip Jones.

Q. Then, as to your contact with Draper, what form did that take.
A. Out of the conversation between Dr Draper and Mr Jones, some time later in August, I do have the diary notes for the actual dates, but some time later in August.

Q. So, you can help us with the date by reference to your diary.
A. That's right.

Q. Looking at MFI 8.
A. Sorry, you said 'diary', I meant notebook which I have behind me here.

Q. That is the notebook you have. Do you ask Madam Commissioner's permission to refresh your memory as to the date at least.
A. Yes, I do.

Q. Have a look at 31 August 1994.
MS NELSON: Whilst the witness is looking at the notebook, he has now been asked on more than one occasion to refresh his memory from it and I ask that it be marked for identification.

MR SMITH: I will do that at the end.

A. The phone call between Draper and Jones was on 9 August 1994. The actual visit by Dr Draper to the Museum when he saw me, that was followed up by a couple of other days closely following it. The first day that Dr Draper came in was 31 August 1994.

Q. Did he do some work in your presence.

A. He initially came and talked to me and then I took him into the room where we are storing the Tindale Journals and he commenced work mainly with the, what we call, `camp site journals' of Norman B. Tindale.

Q. Did you speak with Dr Draper about the purpose of his visit.

A. Yes. I did speak to him and he told me that he was, he said that -

OBJECTION Ms Pyke objects to this evidence being given on the basis that Dr Draper is not going to be a witness in these proceedings.

MR SMITH: That is not necessarily so. Madam Commissioner, I undertake to convey this to Mr Steele who represents Dr Draper.

COMSR: You undertake to convey what?

MR SMITH: This topic of evidence I'll convey to Mr Steele who represents Dr Draper.

COMSR: I don't know if that is the concern.

MS PYKE: It seems to me we are getting evidence of conversations with people who are not part of the proceedings and it would be, ordinarily, hearsay and not relevant to this.

MR ABBOTT: It has got to be. I rise to protest against that. It is absolute nonsense if we cannot have the discussions of what took place between people because Doreen Kartinyeri has decided not to turn up to
P.A. CLARKE XN

Q. What did Dr Draper say to you; what was the purpose of his visit, if he said anything.
A. Dr Draper said that he was getting material for his archaeological report, on Hindmarsh Island.

Q. Did you see what he investigated when he came into the Museum.
A. As I have already said, it was mainly the camp site journals, the archaeological journal of Norman B. Tindale. He also took a copy of my thesis and photocopied at least some sections from that thesis.

Q. Did you otherwise speak to him.
A. I spoke to him for somewhere between half an hour and an hour.

Q. Again, did you - I'm loath to mention this, did you note this conversation in your diary.
A. Yes, I did - sorry, my notebook.

Q. In your notebook.
A. Yes.

Q. In the same way which you noted the conversation with Dr Fergie.
A. Yes.

Q. Do you have a recollection, however, of what was said.
A. It was mainly a one-sided conversation. He spoke of townships, Aboriginal townships, that he had discovered in the Goolwa area.

CONTINUED
He mentioned, briefly, the interaction that he had had with Professor Saunders and, from my memory, that was about it. It was a one-sided conversation. When I tried to put forward my skepticism, he wasn't interested so, therefore, he did not hear a great deal from me on that topic.

Q. Again, can you do your best. I know this might seem artificial to you, but Draper would have said things, some of which you can remember, and you made a reply to it. Can you tell us what that was, rather than summarising it and dismissing it.

A. Just in the broader sense that I have outlined.

Q. Again, you noted the conversation in the same way that you did the conversation with Dr Fergie.

A. That's right.

Q. Again, at least listing topics.

A. That's right.

Q. And the conversation took place over what period of time.

A. From half an hour to an hour.

Q. And would it refresh your memory if you looked at your note, if only to refresh your memory as to the topics that were discussed.

A. Yes, it would.

Q. You ask the Commissioner's permission to refresh your memory from your notebook for that purpose.

A. Yes, I do.

Q. What page of your notebook is it.

A. It is volume 18, p.100.

Q. What was the first topic of conversation.

A. My notes reflect that he spoke of what he called towns around Goolwa, and he put forward his view, which he said was new to Aboriginal archaeology, to look at
Aboriginal occupation as being very intensive in that
region around Goolwa. So he was speaking professionally
and saying that he considered that - he said that there
were many many Aboriginal people living in the area of
Goolwa, roughly near the punt, and he thought that was
very important for the Hindmarsh Island issue.
Q. And what else was said.
A. I am coming to the limits of my memory of what Dr Draper
said, and I don't believe there is anything that he said
to me at all on that occasion that would be in
contravention of that section.
Q. What was the rest that he said to you.
A. He was talking about just his involvement as an
inspector under the Aboriginal Heritage Act in terms of
sorting out the dispute that occurred on the day that
one of the protests down at Goolwa were held. My
knowledge of the actual day he was referring to is not
good, so I won't attempt to go any further, other than
to say that was the topic that he was talking about.
Q. Can I take you to late 1994.
MR KENNY: At this stage, I just indicate that,
from the notes of Dr Clarke, there appears there is some
very sensitive material contained, if he is talking
about the last page of those notes. I ask that that not
be discussed in open court.
COMSR: I haven't seen the last page, but if we
are going to hear any submissions about a sensitive
matter that might have to be heard in private, I would
not propose to hear the submissions on it in public.
MR SMITH: I don't know whether I agree with that,
but out of an abundance of caution, that is actually the
last topic in any event.
COMSR: So you propose to leave it as you have
been previously?
MR SMITH: Would you mind if we adjourned for five minutes, just to resolve the question whether it is truly a Section 35 problem with my learned friend, Mr Kenny, because I do not believe it is.

COMSR: I do not have a copy of the notebooks.

MR SMITH: For the time being, before taking the drastic measure that obviously flows from any assertion that this is a breach of Section 35, could we please have a break for five minutes?

MR ABBOTT: I understood this statement had been tendered as an exhibit.

MR SMITH: It is suppressed.

MR ABBOTT: I would urge you to read this section in the course of the break because, if necessary, one could produce newspaper accounts which refer to this very topic. So we can show, if necessary, it is a matter already in the public domain.

ADJOURNED 3.27 P.M.

RESUMING 3.37 P.M.

MR SMITH: I suggest we adjourn until 10, the question of whether this forthcoming topic being in the public arena could possibly amount to a breach of Section 35 to see if it can be resolved before then. It has been suggested to me that, out of an abundance of caution, you should order the suppression of a small part of this witness’s evidence as to Goolwa town sites mentioned to him by Mr Draper.

COMSR: Suppressed from publication, you mean?

MR SMITH: Yes.

COMSR: I will suppress from publication that portion of this witness's evidence which deals with the topic of town sites near Goolwa.

MS PYKE: The township site near Goolwa and the punt.

COMSR: Near Goolwa and the punt. It is a matter that will have to be resolved clearly. I am the one who exercises an abundance of caution, too, when these matters have to be dealt with.
MR SMITH: Perhaps the witness's notes ought to be at least marked for identification.

Q. Do they go in chronological order at all.

A. Yes, they are in chronological order.

Dr Clarke's field notebook, volume 17, marked 9 for identification.

Dr Clarke's field notebook, volume 18, marked 10 for identification.

ADJOURNED 3.40 P.M. TO FRIDAY, 4 AUGUST 1995 AT 10 A.M.
COMSR STEVENS

ROYAL COMMISSION INTO THE HINDMARSH ISLAND BRIDGE

MONDAY, 7 AUGUST 1995

RESUMING 10.06 A.M.

MR ABBOTT: Madam Commissioner, I'm able to announce that we now act for in excess of ten Ngarrindjeri women. We have provided statements to counsel assisting from, I understand, nine of them already and we have, I think, at least two more statements, two more women to come. There are other Ngarrindjeri women who have indicated and expressed an interest - and I put it no higher than that - in coming to this Commission and giving evidence. I don't propose to name the additional people for whom I act at this stage, except to stay that the names have been communicated to counsel assisting and I don't think it's an appropriate time to announce the names of those women. I will leave that until the appropriate time arrives.
WITNESS P.A. CLARKE CONTINUING

Q. I start by merely reminding you that you are still on oath. I take you back to your conversation with Dr Deane Fergie on 11 July 1994. You were refreshing your memory from your note on that as you were giving evidence.

A. That's right.

Q. You provided, you said, to Dr Fergie a long list of both male and female researchers who had worked in the Lower Murray; that's so, isn't it.

A. That's correct.

Q. Dr Fergie's response to that, according to you, was that: `Since none of them had worked within the feminist anthropological tradition, they were not crucial to the issue of whether women's business existed in the Lower Murray'.

A. That's correct.

Q. Do you have an understanding of what the `feminist anthropological tradition' is.

A. In it's broader sense, it would be a methodology where by someone investigating an ethnographic situation would, be sensitive towards issues of gender. In its more narrowly defined sense, it could possibly mean other things in terms of the more recent literature. In its broadest sense, people such as Catherine Berndt would be considered to have been early feminist anthropologists.

Q. Of the list, or what you have described as the long list of both male and female researchers who had worked in the Lower Murray, was Catherine Berndt included in that.

A. That's right.

Q. Any other female researchers.

A. Alison Harvey. That is someone who I would have mentioned. Jane Jacobs, if I broadened out the list of researchers to anthropologists and cultural geologists.
OBJECTION: Mr Miss Pyke objects on the ground that the witness has not stated that he would have mentioned Jane Jacobs.

WITNESS: Yes, I would have mentioned Jane Jacobs, yes.

COMSR:

Q. Do you recall whether you did or didn't mention Jane.
A. Yes, I do recall mentioning Jane Jacobs, and I also recall mentioning Faye Gale.

Q. Your recollection is that there were four people:
A. Alison Harvey, Jane Jacobs, Catherine Berndt and Faye Gale.

Q. And who is the pre-eminent of those.
A. Kathering Berndt.

Q. Is Catherine Berndt regarded as a feminist anthropologist.
A. No. In the broadest sense, I would certainly regard her as a feminist anthropologist; that is, an anthropologist who is looking specifically at gender relations in Aboriginal culture.

Q. Can you tell us if your knowledge of the literature in the area and the commentators on the area, whether she is so regarded by other anthropologists.
A. Yes. Well, she was highly regarded enough in the feminist anthropological tradition to be asked to put in a chapter in the Aboriginal, or the 'Woman's Rites and Sites' volume edited by Peggy Brock. She is an author in that volume.

Q. Looking at this text produced to you, is that the text book you have just mentioned.
A. Yes, it is.

Q. What is the nature of that text book exactly.
A. This book grew from a report that was commissioned to look into Aboriginal women's issues in relation to Aboriginal heritage in South Australia.

Q. As to contributors, how many are there.
A. There are about four or five or six contributors.
Q. Including.
A. Catherine Berndt in chapter one, and there are six other contributors.
Q. I think the introduction, or foreword, is there written by Jane Jacobs.
A. No. Jane Jacobs has written chapter five entitled ‘Women Talking Up Big’. The first chapter is written by Catherine Berndt.
Q. I think Catherine Berndt is acknowledged by such people as Jane Jacobs as being a feminist anthropologist.
A. Yes.
Q. In that volume, in particular at p.81, is that right.
A. That's correct.
Q. Can I take you to another topic altogether now: The question of methodology in connection with reporting, for instance, or advising in respect of Aboriginal links to land. Can you tell us what the anthropological methodology for advising in such an area would be.
COMSR: Before we proceed any further, we are not in danger of intruding into any area where we should be careful?
MR SMITH: Well, Madam Commissioner, the Federal Court proceedings infringement are you thinking of?
COMSR: No, I was thinking of s.35 actually, but the Federal Court proceedings as well.
MR SMITH: Not yet. I will flag that when we come to it.
Q. So, do I need to repeat the question.
A. If I've got the question correct, you want know an outline, a methodology, for writing a report on Aboriginal links to land?
Q. Yes. In a general way, what are the sorts of things you would give attention to.
A. In a very brief way, I would start by discussing what is
the report or the assessments actually directed at that
would bring in straight away any key concepts which will
be dealt with in the report. That introductory part of
the report would also discuss any of the Aboriginal
groups involved and who was funding the report, who the
target audience for the report would be. Then, would go
into a bit more detail describing in more detail who the
Aboriginal people involved in the target publication of
the report. So, by that, I mean just describing briefly
their history in terms of any aspect of their history
that would have shaped them in the present. It would
include a rough demography where people were living and
why they were living in such places. In terms of what
it is the reports are aiming at, there would then need
to be a discussion on the transfer or knowledge within
that community, which may mean describing family and
sort of broader political structures in the community,
and would ultimately - particularly if it was a land
claim type of report - would need extensive geniality to
demonstrate how certain information is being
transferred, you know, within that community. So, there
would need to be a reasonable introduction, and part of
that would be framing the reason for the report within
the literature. For example, a report involving the
Central Australian area would need to refer to key
seminal works that relate to various aspects that the
report would touch upon. So, the report would have to
place itself somewhere in the literature. Once that is
done, you would get into, you know, the main
ethnographic part of the report. Depending on what the
report is I'm aiming to achieve, there would be many
ways of doing that, but you would prepare, you know, the
body of the ethnographic information which -

Q. Could I interrupt you there. You mentioned the
   literature. For instance, if you were doing a report
   relating to - did you say Central Australia.
A. Yes. You would then look for the anthropological
   literature that related to the Central Australian
Q. Would that be to identify, for instance, a model or a structure from which you could -
A. Yes. That literature would come with, well, several models. There would be one model which would be relevant to the report and the writer of the report would need to recognise that and be aware of possible discrepancies that their own data may bring out at the same time for the other areas that literature would reinforce. The literature would need to be addressed in order to strengthen the outcomes of the report.
Q. Just to descend from the general into the particular for the moment. In respect of this particular inquiry, if the model threw up, that is the discretion of the literature and the establishing of the model of the culture threw up, no secret sacred women's business, then that would cause some concern to the reporter, would it.
A. That's right. It would have to be flagged as a major discrepancy and the writer of the report would then be obliged to account for that discrepancy; and there may need to be new or different data added to the report in order to support a new model that the writer would be putting forward.
Q. That's the way that you -
A. I was, I hadn't got to the end of the report which would be a summary of the findings. And, at that stage, once again, one would have to draw attention to departures from the literature and at the end of that process come out with recommendations and the outcome of the report. The report would also, should have by way of an appendices a list of people consulted, a reasonable bibliography, including both ethnographic sources and sources of anthropological strategies and methodology. And the report should make it clear whether there's been some form of peer review, or at least certain aspects of the report having been discussed with other anthropologists who would have expertise with various
parts of that report. So, that is as a general model.
Of course, that could be modified to varying degrees in
terms of what is actually, you know, the report's trying
to achieve. But, in general, that would be a scholarly
approach to an anthropological problem.
Q. Where one of the dominant elements of the report was
concerned with the conveyance of knowledge from
Aboriginal persons to the reporter, does your
methodology include any care to be taken in terms of who
it is that is conveying the knowledge and the question
of presentation, if you like.
A. Well, one, an anthropologist doing such a research would
have to be very critical of all sources of their
information. So, naturally, they wouldn't rely on just
one or two informants. There would have to be a process
whereby the researcher investigated all the possible
variations that may occur within the target community in
terms of what the information that is relevant, what the
variation is within that information. So, if there are
several different schools of thought on a particular
issue that the report's addressing, then there has to be
some sort of explanation - even if it's background
research - that goes some way towards explaining why
there are different opinions on the information from the
side of the Aboriginal informants. Part of that may
well be contacting other anthropologists with other
experience with that community to try to develop a model
that explained differences of opinion that may present
themselves after interviewing quite a wide range of
informants.
CONTINUED
Q. Do traditional owners, bearing in mind that there is linkages with land that are being reported upon, is it necessary to establish some contact with traditional owners.
A. It would be. For many parts of the Australia within the community, there is quite strong - within the Aboriginal community, there is quite strong notions of particular groups within that community that have more rights to speak for certain land, certain mythological traditions. In terms of more heavily settled parts of Australia, there are still anthropological records, such as the ones that the museum holds, which still indicate possible traditional owners in the present-day community. So, there is an archival source of establishing traditional owners and there is a contemporary field work of establishing those traditional owners.

Q. Looking at the text book, now before you, Exhibit 11, which has just been tendered, on p.16 of that text book, that is part of an article, is it not, written by, can you tell us.
A. Catherine Berndt.
Q. If we go to p.16, about .6, the topic being discussed there, by Catherine Berndt, is oral tradition, is it not.
A. That's correct.
Q. At .6, Catherine Berndt makes a point about seeking information about cultural knowledge, doesn't she.
A. That's correct.
Q. Would you read that paragraph into the record.
A. I am quoting `In seeking information about cultural knowledge in these circumstances, it is, of course, not enough to choose an Aboriginal person or a woman. That is likely to be a surface or bandaid measure defeating the purpose of such an inquiry.'
Q. And that is the end of the quote.
A. That is the end of that quote.
Q. That is the end of that paragraph and, of course, that
has to be read in context; but, can you tell us what you understand to be the meaning of that: what is Catherine Berndt telling us there.

A. I interpret it as meaning that, between doing field work, one would have to be very rigorous in being critical of all of the data that they are receiving. I think, in today's circumstances, whereby the media, whether it be published works or videos or TV, radio, carries an enormous load of cultural knowledge. Therefore, one would have to try and work out what the basis of the cultural knowledge that an anthropologist would be receiving, whether it is information that has come through a particular line in the community, or whether it is information that has possibly filtered in from non-Aboriginal sources.

Q. Are you there then drawing - indicating that it is necessary to identify, what, contemporary political impetus.

A. That's correct. Catherine Berndt also talks on this page about internal checks and sanctions on information. So, what she is saying is that one would have to fully explore the circumstances which produce the cultural knowledge. It is not enough just to receive the facts of that knowledge and then to report on them.

Q. Would that be particularly the case, if the cultural knowledge that is being received did not fit in with the model that had been identified in the literature as appropriate to that culture.

A. Yes, that's correct. An anthropologist, from whatever part of that wide discipline, would have to come to terms with the sociopolitical factors that produce that knowledge.

Q. And genealogies have a part to play in that, that proper compilation of the report.

A. Genealogies and also lists of people that have been living on certain parts of the landscape. So, getting an idea of the demography, at large, but genealogies being a big part of that, as a way of demonstrating the
connectedness between some informants.

Q. If you were driven to report on a matter quickly and without, say, an ideal amount of time to do a thorough job, what would an anthropologist do, short of not reporting, at all, of course, assuming that.

A. Yes, if I have found myself having to do a report, in an area where I had not actively done field work, I would try to, as quickly as possible, build a bibliography that - which included historical and ethnographic sources. So, I would try to quickly build a model of who the people that I would be reporting on were. I would also get on the phone and contact other anthropologists, who have worked in that general area - geographical area. If the report was based on a particular part of the function of that community, then I could also contact people who are - who have expertise in particular aspects of the community, as well, but in a sort of broad sense. I would be reluctant to do such a report without having at least time to do that. There would always be the risk of overlooking significant pieces of literature that pretty well already covered the scope of the report.

Q. Would you do what lawyers often do, couch the report in terms of having a reservation, if you felt you hadn't had enough time to do justice to the brief.

A. Yes, I think, the longer you would have to do the report, perhaps the more game you could be, in terms of feeling confident. If some of the findings of the report were going to greatly challenge the existing literature, I would also, once the report had been completed, be wanting at least parts of it to be run through by other colleagues in the area, even if it was a matter of just getting them on the phone and running some of the findings through.

Q. Looking at Exhibit 5, the report of Dr Deane Fergie, dated 4 February 1994, now before you; we are not going to go into any detail here, but you have read that report.
A. That's correct.
Q. And considered it.
A. That's correct.
Q. I think you told us, the last time you gave evidence, that you disagree with much of that report.
A. That's right.
Q. I think you have also considered the - over the last few days or more, the statement of your colleague, Mr Steven Hemming, in the same way.
A. That's correct.
Q. Does the same comment apply; that you have disagreement with some of what Mr Hemming has said, in his statement of evidence.
A. That's correct.
Q. I think you have also had occasion to consider, in the last week, or so, the report of Professor Cheryl Saunders, dated in July of 1994.
MR ABBOTT: 7 July.
XN
Q. 7 July.
A. There are parts of that report that I have read. I have not seen the whole report.
MR SMITH: There is one more topic I want to raise in chief, as it were, with this witness which encroaches into the area of women's business and brings into play problems with s.35.
COMSR: I have to consider the ambit of my authorisation, under s.35 of the Aboriginal Heritage Act, and who can be permitted to remain at a hearing, while this evidence is being canvassed?
MR SMITH: Yes, and I would be suggesting that you should close the hearing, on the same basis as you did before. And perhaps I could indicate for you and for those present who may not be able to be present during the next section of evidence, that this will be a short topic of evidence and that, as I understand it, Ms Nelson will commence cross-examination, at the finish of Dr Clarke's evidence, and much of her cross-examination,
at least the commencement of it, will not involve
problems of s.35. So that the hearing room will not
necessarily have to be closed, for any great length of
time.
COMSR: I will propose, then, having regard to
the terms of my authorisation, under s.35 of the
Aboriginal Heritage Act, to close this hearing, except
to those persons whom I permit to be present; and they
are: counsel acting for or representing parties, counsel
assisting, Commission staff necessarily present during
the hearing and, where parties are not represented,
there are no legal representatives here, I will see if
those persons should be permitted to remain at the
hearing. But I would ask all other persons to vacate
the hearing room, while this part of the evidence is
being dealt with.
Perhaps, when the others have gone out, I will hear
you as to whether or not you should be permitted to
remain in court, during this part.
I can see there are two ladies whom I don't identify
as being parties, as such, to the matter before me.
Is it your application that you should be permitted
to remain at the hearing, during this passage of the
evidence; the two Aboriginal ladies?
MS KEEF: We would sort of like to stay, if we
possibly could?
MR SMITH: Should I speak to those ladies, quietly?
They may feel some reticence speaking up in an open
hearing.
COMSR: It may be that there is nothing contrary
to Aboriginal tradition for these ladies to remain at
the hearing. So, you can ascertain that, if you like,
Mr Smith.
I will ask my clerk to make a list of those persons
who are present at the hearing during this closed
session today.
MR SMITH: One of the ladies is a Ngarrindjeri lady
and the other is an Aboriginal lady of another people.
They simply ask that they be enabled to remain and you
have power to allow that, if you want to.
COMSR: Yes, I appreciate that.
MR SMITH: Their interest is to that extent.
MS PYKE: Can I perhaps say something?
That Dr Fergie, my client, has just indicated that -
expresses some concerns about the nonNgarrindjeri woman
remaining present. Given the nature of the evidence
that may be called or may be given, that it might
possibly infringe on the confidentiality of the
Ngarrindjeri women.
MR ABBOTT: We also have some concerns about this
setting a precedent. If this is to start with a woman
claiming to be a Ngarrindjeri lady, then how many more
are we to let in? Why should others be excluded? It
would seem to me that your ruling is that parties,
counsel present, are permitted to remain and, until that
ruling is varied in a way that impacts upon those that
might want to come, that is the way it should be.
COMSR: Yes, Mr Abbott, the authorisation is
only required under circumstances where the divulgence
of information is contrary to Aboriginal tradition. It
is my understanding, I suppose, that what we are talking
about is the possibility does arise, as it happens, if
we are talking about - if there is a claim that secret
women's business is known only the to certain persons
and not to others, I suppose the possibility does arise.
But, here, I can't see that being the circumstance where
we have a male witness about to give evidence.
MR ABBOTT: No, I wasn't suggesting that this
necessarily comes - that anything could deleteriously
happen by that. I am wondering where you draw the line,
that is all.
COMSR: I can understand that. And I do have
some problem.
The Ngarrindjeri lady, the lady who says she is a
Ngarrindjeri lady, what is your name?
MS KEEF: My name is Pam Keef.
COMSR: I do have this problem, of course, when I am called upon to make a decision at the hearing on the spur of the moment; and that is the verification, if I can put it that way. You might know that you are a Ngarrindjeri lady, but I have a problem of having to make a decision at a hearing on the spur of the moment, when probably you have not given any thought to the difficulty I am confronted with, under those circumstances.

MR SMITH: I think the safest course, bearing in mind what has happened before, where everybody was excluded - and meaning no disrespect to anybody - apart from counsel, legal representatives and their clients, the safest course might be to follow the same course; at least for the time being.

COMSR: Yes, I am in this difficulty; that, under this particular authorisation, I have to decide who should be permitted to remain and I am not in a situation where I have got any verification from you ladies.

MS PYKE: I wonder if I might comment? Dr Clarke tell us that he has a substantial involvement with the Ngarrindjeri community. Perhaps he could comment on whether he knows this woman to be a Ngarrindjeri woman?

MR SMITH: I think it is a problem. It has the capacity of being a problem, making ad hoc exemptions, Madam Commissioner, to this order.

MR MEYER: Could I endorse counsel assisting? I think there is a straight problem in this. If people are going to be represented outside of the parties, there is the opportunity for representation. And, other than that, I heartily agree with your Honour's comments. Otherwise, we have all sorts of problems of who may remain.

COMSR: I have the difficulty; I am reluctant to ask ladies with a genuine interest to leave, but I hope you appreciate that I have a difficulty.
MS KEEF: That is all right.
COMSR: Is there anyone else in the room who isn't a party?
Is there a gentleman at the back there who is indicating that he is not?
MR SMITH: Yes, Brian Martin represents Ian McLachlan and you gave him leave. This is Mr Miller, from Mr McLachlan's office.
COMSR: I don't wish to be niggly about this.
MR MEYER: I can verify who this man is. I have met him, on a number of occasions. I recognise Mr Miller as being Mr Miller. He is Mr McLachlan's right-hand man and he is on Mr McLachlan's staff.
COMSR: Yes.
MS PYKE: I would object - it is not Mr McLachlan - if we are going to start having proxies.
COMSR: Yes, that is the problem. If it were a legal representative, I wouldn't have a problem, at all. So, again, unfortunate though it might be, I am going to have to ask you to leave.
MR SMITH: And that leaves one other; Philip Jones, an anthropologist.
COMSR: Was that subject to a written undertaking as to confidentiality being obtained from the anthropologist?
MR SMITH: It was. And we have obtained one from Mr Jones.
COMSR: As no counsel wishes to be heard about that permitted exception, Mr Jones will be permitted to remain in court.
We have a full list of the persons permitted to remain in court.

HEARING CLOSED

Closed hearing.

7.8.95

page 279-295
MR LOVELL: Yes, or through matters raised by other witnesses directly involving Mr Kenny. We only seek leave to that respect.

COMSR: Upon Mr Smith undertaking, I suppose, to let you know of any matters raised during the course of the hearing?

MR LOVELL: Yes.

COMSR: You have leave to appear on behalf of Mr Kenny in the event that he is called as a witness to give evidence in the hearing.

MR LOVELL: Yes, that is so.

CROSS-EXAMINATION BY MS NELSON

Q. Your primary degree was a Bachelor of Science undertaken at the University of Adelaide in which you majored in botany and zoology.

A. That's correct.

Q. Putting it in simple terms, that is the study of plants and the study of animals.

A. Yes, there was an ecological focus through both of those majors. So, on a broader level, biology and ecology, yes.
Q. You completed that degree, in 1981.
A. That's correct.
Q. You would have been admitted to that degree in 1982, is that right.
A. That would be right, yes.
Q. Then, in 1983, you commenced a Bachelor of Arts degree.
A. That's correct.
Q. You completed that, in 1986.
A. That would be right, yes.
Q. You said that you started work at the museum in early 1982.
A. That's correct.
Q. At which time you had finished your degree in botany and zoology, but you had not commenced your study of anthropology.
A. Part of my Bachelor of Science degree included one subject in anthropology. So, I had - I did come to the museum with some background in anthropology.
Q. Over how many years did that one subject -
A. That was one year, one subject.
Q. You would agree, at that stage, that your knowledge of anthropology was limited by reason of that limited study.
A. I had general knowledge, but no specific knowledge.
Q. You said that you worked first as a volunteer.
A. That's correct.
Q. For how long did you work as a volunteer.
A. That was for several months.
Q. What work were you doing, when you were working as a volunteer.
A. I was going through a collection of artefacts that was or had never been put in order and I was sorting out, initially, categories of objects, such as weapons, into a taxonomic system.
Q. Were they Aboriginal artefacts.
A. That's correct.
Q. Belonging to which community, if any.
A. It was cross cutting. It was categories of objects
covering the whole of Australia.

Q. How long did you do that.
A. That was for several months. I haven't got a precise figure on that.

Q. It is correct, is it not, that you were not employed in any permanent capacity, until 1983.
A. Even in 1983, technically, it wouldn't have been permanent. I - the first lot of employment I received was on the basis of grants up to six months at a time.

Q. When, then, were you employed permanently.
A. Without going back over my employment record that I would have to have a look at, it was - would have been sometime in 1984, I imagine.

Q. Just to clarify something; you were working full-time, but on a grant system, from 1982 to 1984, is that what you are saying.
A. From part of 1982, right through to about 1984, yes, I was working on six month grants.

Q. After you finished the work which involved organising and listing these artefacts, what work did you then do.
A. The first long-term grant that I had in the museum involved getting together a catalogue of artefacts relating to the Darwin region and exploring what we had in the archives and doing a literature survey. I say the first major grant; while I was a volunteer, I was getting some paid work, doing visitors surveys for another section of the museum.

Q. Visitors surveys.
A. Yes, that was just an hourly paid job that I had in the museum, while I was a volunteer. Just a few hours a week.

Q. What did that involve; working out the sort of people who came there and how many.
A. That type of thing.

Q. Like a market survey.
A. Yes, it was a market survey.
Q. How long did you do the cataloguing relating to the Darwin region.
A. I think it was something like six months.
Q. What was the next work that you did.
A. The next work that I did would have been or was background research for our secret sacred men's objects repatriation programme. That involved, again, putting together a catalogue and doing a basic research of sources that were in our archives and a literature survey of things that related to those secret sacred men's objects.
Q. What you are talking about there is looking at objects which the museum already had.
A. Looking at objects that we already had, but, in some cases, we had no idea whether they were in the restricted category or not. So, we have got something like 30,000 Aboriginal and ethnographic items alone. So, it involved quite a bit of physical work, as well as searching records.
Q. What do you mean by 'physical work'.
A. Physical work of going through the stores and tracking down objects that could relate to that category and then organising them into a new system.
Q. Were they objects from all over Australia, or from one specific part.
A. They were predominantly objects from the northern regions, but that encompassed the Kimberleys, right through to Central Australia and Arnhem Land and Northern Queensland.
Q. But, as I understand it, you weren't going out and collecting these; they were already there. It was simply your job, if you could, to distinguish between those which were capable of being generally publicised and those which could be categorised as secret sacred objects.
A. That's right. The work was museum-based.
Q. In order to establish whether or not they should belong to the restricted category, you referred to the existing
That was largely so. We did have the benefit of occasional anthropologists coming through. So, there was a network out there, as well. But mainly going through our own archives, our own records that came in with the objects and compiling an object history for each object, as far as possible.

Q. Did you work on this project alone, or under someone's supervision.

A. I was supervised by Steve Hemming.

Q. He was already in the employment of the museum, was he not, when you started.

A. He was an acting curator, yes.

Q. How long did you work cataloguing these various objects.

A. We had one grant and then that was extended. So, I imagine that work took roughly a year. The cataloguing of men's secret sacred objects.

Q. What was your next task.

A. At that stage, a vacancy appeared in the museum, as a museum assistant. It was a permanent job. So, I took a cut in pay, as a research officer, to enable myself to get into permanent employment. So, I was employed as a museum assistant.

Q. What work did that involve.

A. That involved much broader tasks involving administration, assisting in field work, answering enquiries, public enquiries, helping visiting researchers, including Aboriginal people, when they came in. Broader tasks, but tasks that contributed to the what we called the Australian Ethnology Section. This is before we had a Division of Anthropology.

Q. When you say assisting people who came in and particularly Aboriginal people with enquiries, as a museum assistant, you were not empowered to give them advice, or your interpretation of anything.

A. I was empowered to give advice of the general categories in terms of what were the registers, what I knew to be in the collection. So, I did have powers, at a general
level, but it was expected that I would know where the -
where I would have to defer to a curator, if a high
level of information was being sought.
Q. At what level did you consider you would have had to
defer to a curator.
A. If I had a, for example, phone call, which was from an
organisation that we didn't have any prior arrangement
with, I would collect the details and not move on their
request, until I had spoken to the curator. And that is
one example. So, certainly outside from the museum
contact would have to be run past the curator.
Q. If there was an existing prior arrangement with an
organisation, was that reduced to written guidelines, so
you knew what you could tell them and what you were not
empowered to tell them.
A. Yes, there would be a general understanding, if there
was already a relationship, a joint working practice, of
how I would proceed. And I would proceed within those -
with that general understanding that I had with the
acting curator, at that time.
Q. Of course, you would have been limited, in any event, by
your own particular lack of expertise in certain areas,
at that time, would you not.
A. In the museum we, were encouraged to be eclectic with
our expertise. I can't imagine where I would have
received an enquiry that I wouldn't have been able to at
least fulfil at a basic level. If the inquiry came in
about - which involved archaeology or human biology, I
would naturally have referred that on to the archaeology
staff. So, it is a matter of recognising who would be
the best person within the museum framework, in order to
redirect those type of enquiries.
Q. Did you not consider, yourself, that you had certain
limitations on what you could help people with.
A. On the basis of the reading I was doing when I started
there, my own particular research interests being the
Aboriginal use of the environment, I quickly gained
expertise of at least one area. What we are asked to do
in the museum is often on a most basic level. So, someone who knows the basic texts in the library to refer to can get by. So, I did gain expertise, over a couple of years, quite quickly.

Q. Was that something in your own estimation, or was there some sort of refereeing system within the museum structure, itself, where someone superior to you would indicate that you could now go a step further than basic material.

A. The fact that I had been classified as a research officer, when I was doing the initial research for the Darwin material and the secret sacred material shows that the museum considered that I was a researcher, in my own right. I mean, there is quite a broad area of Australian anthropology, Aboriginal anthropology. There is certain basic knowledge that can be gleaned from basic texts and then people's own specific interests sort of take on from there. So, you know, very quickly, anything that was an enquiry that related to projects, such as the Darwin area and secret sacred material that I had already been working on, plus my own research interests, in terms of Aboriginal use of the environment, well, naturally, I would take on the major role in answering that. You know, answering that would entail showing it to other people in the division. I might mention that Philip Jones was around when I arrived. He also, to some extent, supervised my role within the division when it took - when projects overlapped with the project that he was being employed on as a research officer.

Q. What position did Philip Jones have, when you first started at the museum.

A. He was - he had done one grant as a research assistant for Roger Dubers, going through the collections. He, at that stage, was commencing work on the proposal for a new gallery, which turned out to be the Ngurunderi gallery.

Q. I don't think you answered the question; what was his
position. You told me what he was doing, but not what his position was.

A. I'm not sure exactly how he was defined. You would have to direct that question to him.

CONTINUED
Q. After you finished cataloguing the secret sacred men's objects, you then became a Museum assistant. How long did you work as a Museum assistant.
A. When I became a Museum assistant, it was at a time when the Museum and the public service at large was redefining its structure. Again, I would have to refer to my employment docket in the Museum to come up with an exact date for that.
Q. Approximately will do.
A. It was possibly something up to about two years.
Q. By which time you had completed your Bachelor of Arts.
A. Yes. That sounds correct.
Q. What was your next position in the Museum.
A. When the public service had redefined the roles of various people in the Museum, out of that, I was classified as Registrar of the Anthropological Division. That also - part of that was an upgrade of public service position.
Q. Whilst you were a Museum assistant, you have told us that you had a broader role and part of that involved assisting in field work.
A. That's correct.
Q. For how much of that two year period did you actively assist in field work.
A. There would have been a number of trips, some of them up to a week, a week and a half in length, so it's difficult to put a figure on it. But it would be, you know, maybe four or five weeks, six weeks of actual on-site field work for each year.
Q. Four to six weeks each year.
A. For one year it may have been higher. It's hard for me to come back on figures which are - you know, we are looking at sort of roughly ten years ago worth of field work. I could refer to my notebooks if you require a more precise figure.
Q. Did you only assist Steve Hemming, as you told us in your evidence, or did you assist other people as well.
A. Yes. I embarked on some field work with Philip Jones up...
in the Flinders Ranges region.

Q. When you assisted Steve Hemming in his field work in this two year period that you were a Museum assistant, where did his field work take him?

A. His field work at that stage was mainly around the Lower Murray and South East region of South Australia.

Q. Did you understand that he had a particular interest in that area.

A. Yes. We all had interests in the area because of the gallery.

Q. That may be so. Did you understand that he had a particular interest.

A. No. I think he had a fairly broad interest in the area.

Q. Which area.

A. In the Lower Murray, South East, or shall we call it the Ngarrindjeri area.

Q. Perhaps I put a bad question and I got the answer I deserved. Did you understand his interest in Aboriginal culture was in particular to that area as opposed to another area in Australia.

A. That's right. Yes, he was focused on the Ngarrindjeri area.

Q. When you say that you assisted him in his field work, what did your assistance involve, what role did you play.

A. There is the practical end of driving, you know, organising money for various reasons, sometimes for paying Aboriginal people as informants. Also, assisting him in the sense of identifying plants and taking on the recording of the Aboriginal use of the environment.

Q. As I understand your evidence at that time, your own focus was on the cultural aspects of plants and animals.

A. Yes. The `cultural aspects' being initially what plants and animals were being used and then, as the project developed more, recording the roles of plants and animals in mythological and other sorts of less - in western European terms, less empirical function within the culture.
Q. What do you mean by that.
A. I mean things that plants, for example, that may be used
as food as distinct from plants that are believed to
have some, you know, curing property. But it's really
the ritual use of that plant that imparts the sort of
healing property rather than something that western
Europeans would analyse and come up with some chemical
basis of how those plants are used.
Q. So you would accompany Mr Hemming when he spoke to
Aboriginal people in that area.
A. Yes. There were field trips to the Lower Murray with
Philip Jones, but mainly Steve Hemming - and I would
accompany him, yes.
Q. Had you an opportunity to observe his interaction with
those people.
A. I interacted with them as well and I observed his
interaction, yes.
Q. From your observation, did he appear to have a good
rapport with those people.
A. Certain people he had quite a good rapport with. There
were other people that were, you know, made it quite
obvious they did not want to speak to the Museum and so
we didn't put too much pressure on them.
Q. From your experience, now that is often the position,
Isn't it, that you can establish a rapport with certain
members of the comment and not with others.
A. Yes. By establishing rapport with certain members,
sometimes in doing that you are automatically alienating
yourself from other members of the community.
Q. And there are times you are also encouraging other
members to be a bit more forthcoming.
A. I'm sorry, I'm not sure what you mean there?
Q. I have in mind that you have to break the ice, so to
speak, so that often you can establish a rapport with
some members and the more reticent members will become
more communicative as you obtain a degree of trust.
A. Yes. It is a long process.
Q. You have to be very patient.
A. That's correct.
Q. And in general terms from the work that you have done with Aboriginal communities as opposed to other communities, they are not people who are generally forthcoming to someone they don't know.
A. There are difficulties with all generalisations. It's often the case of just being seen often enough in a community for Aboriginal people to get used to you can explain why you are there and any implications there might be for speaking to you. So it's a rather complex interaction. It's not a matter of breaking the ice.

Q. So, it's a lengthy process and one where you have to be seen frequently, where they have to trust you personally and have confidence in the institution you represent.
A. All of those things. Although, in terms of the institution, often that becomes less important. Aboriginal people would rather, in many cases, you know, deal with the individual rather than necessarily set up a relationship with the institution and, therefore, speak to anyone from that institution who comes down.

Q. In you don't have a personal rapport with some individuals, you are not going to get any information out of them that is relevant, are you.
A. Not necessarily. You are talking about fairly normal field work techniques. With less normal techniques, you can get abundant information from people who are not formally handing you information as information. I mean, we are - up to now, you have been talking about formal field work techniques whereby someone arrives and pulls out a tape recorder and then says: `Tell me everything you know'. There are other less intrusive field work techniques, and even to the extent of often what people don't say. But the way they don't say can still impart quite a bit of knowledge. Sometimes, it might be the actions of someone who doesn't particularly
want to tell the anthropologist anything that may be interpreted by other members of the Aboriginal community who could then comment on what is going on. You know, I think you have a rather simplistic model of what field work is compared to. It's a lot more complicated.

Q. You tell me what other techniques there are apart from direct communication.

A. Participant observation. That means getting involved in the community through - or in some cases any means available. By putting up a local display there during NADOC week - that is, Natural Aborigines and Islander Day Observance Committee week - that is one of several Aboriginal functions that appear during the year. So, often just getting some involvement in supplying a school at a place like Point McLeay with resources, temporary displays and things, enables a researcher to be around and start to communicate and communicate with Aboriginal people on levels other than formal situations whereby information is asked and may be delivered.

Q. Do you mean in the course of social interaction.

A. That would include social interaction. Sometimes interaction that may involve some official function, but not a function that is necessarily one that is aimed towards the anthropologist eliciting information for the purposes of a display or research project. The example that I gave of being involved in, say, the Aboriginal school down at Raukkana is one mechanism of gaining some rapport with the Aboriginal people in that community.
Q. Have you personally been involved in a NADOC display.
A. Yes. I've probably put together a dozen or more NADOC displays over the years, ranging from places like Point McLeay, to other towns in the Lower Murray, to even places further afield in South Australia.
Q. Similarly, have you been involved in displays or something similar at the school.
A. Yes, I have been involved, and I've been asked to put on a display for cultural week in two weeks time. So it is a regular event for me to be rung up and asked to contribute in any way possible with cultural functions involving the school.
Q. It still comes back though, doesn't it, to your ability to communicate. That is a skill you need, isn't it, in your discipline.
A. Yes. You've got to have a skill to communicate with a broad range of people, and you have got to have patience, yes.
Q. The quality and depth of the information you get may be a reflection of your own communication skills.
A. If you are talking about information about how contemporary people are living and how they are thinking and feeling, there is some truth in that. I mean, there are other sources of information. There is quite an extensive literature on contemporary Aboriginal experience. So I wouldn't say that it's the only way of tapping into that information, but it is certainly an important way of doing it.
Q. The literature, of course, is based upon the author's ability to communicate.
A. Yes, and you've got a way of measuring how successful they are from your own field work and the field work of others.
Q. I have taken you off at a tangent. You were telling me that you became the registrar of the anthropology division. How long did you occupy that post.
A. Again, I have difficulty coming up with a precise figure because -

Q. I am not at any time asking you for a precise figure. An approximate figure will do for my purposes.

A. It was probably a year, maybe two years.

Q. What did that job entail.

A. The biggest part of that job would have been the organisation of our museum records into a computer system - the museum records relating to our Aboriginal family history project. That had to be computerized, as well as some records relating to our archives and our records relating to Aboriginal artefacts of Aboriginal people that we had in our collection. So that was actually work that was started before I was termed a registrar, but it is a function that I retained, even though I had other designations, right up until a couple of years ago.

Q. What was your next position after you became registrar of anthropology.

A. Collection manager for the anthropology division.

Q. How long did you hold that post.

A. One to two years.

Q. What would that involve.

A. That was really a redefinition of the registrar's position that I had. It also would have involved a change in my level of public service position. It essentially was recognizing my management function within the division of anthropology.

Q. What was your next position.

A. I was then made a curator of anthropology.

Q. When was that.

A. Roughly about four years ago.

Q. About 1990.

A. Somewhere in that vicinity, yes.

Q. Can you relate it to this: Was it before or after you started your PhD.

A. It would have been during - well, after - yes, it would have been after I started the PhD.
Q. Is that your present position.
A. No. I've since been made senior curator.
Q. When was that.
A. That was in November of 1994.
Q. Last year.
Q. Whilst you worked as a curator, what did your work involve.
A. That was the time that Mr Steve Hemming had gone off, left the museum for 18 months or so. So I took on the bulk of his work, which, in particular, was the work that involved southern South Australia. I was already involved in working on a number of those projects, so I took over the running of his several existing projects, the ones that he didn't take with him that were left. And I also had supervising functions. Supervising two Aboriginal women, for example.
Q. What were the existing projects of Mr Hemming's that you took over.
A. The -
Q. I don't really want the details of them. Just give me a general description.
A. They were display orientated functions.
Q. Display at the museum.
A. No - well, yes, an upgrade of the Ngurunderi display was one function. There was also a display that we had been working on together involving the Murray Bridge area, and when he left I took over the sole running of that particular display project. So that was a display that was going to go up at Murray Bridge.
Q. You have told us that you completed your thesis or your doctorate in 1994.
A. March. It was submitted in March 1994.
Q. Then there is a period when it is examined.
A. That's correct.
Q. That takes some time.
A. Yes, it took some time.
Q. But at some stage you were advised that you would be admitted to the doctorate.
A. That's right.
Q. Do you recall when you were advised that you would be admitted to the doctorate.
A. It would have been around about September or October 1994.
Q. Who were your examiners.
A. I had - sorry, examiners?
Q. You have told us who your supervisors were, but who were your examiners.
A. I had a social anthropologist as an examiner and a cultural geographer. But normally it is not required that I even know who my examiners are. So I would consider that information in that area I would have rights to withhold.
Q. Early in your evidence, some days ago now, you described the various periods, in a general sense, of Aboriginal occupation as one phase.
A. No, that's not correct. I was - are you talking about the phases on my Time Line?
Q. Yes.
A. No, that's not correct. I was talking about the exploration phase.
Q. Is that prior to occupation.
A. No, no. Well, it could be. You can't have explorers in a region without, you know, Europeans coming into contact with that region. It also included the sealers' occupation of Kangaroo Island and, even when South Australia was settled, they were still exploring the landscape in terms of overland routes and tracks and water holes and that type of thing.
Q. If I can adopt the phrase 'the exploration phase', is that prior to the settlement of South Australia.
A. No, it's not.
Q. When do you date that from.
A. I date it from the first sighting of the coastline of South Australia to several years after settlement, European English settlement in Adelaide and Encounter Bay.

Q. Prior to the first sighting of the South Australian coast, it is your understanding, isn't it, that the recording of Aboriginal history has been oral.

A. Sorry, I can't understand that. The recording of Aboriginal history is oral?

Q. The Aboriginal people, prior to the first sighting of the South Australian coast, were an illiterate people, were they not.

A. That's correct.

Q. So that, in order to hand down any folklore or history, it was by word of mouth from one person to another.

A. That's correct. The landscape though has a role. The proof - the evidence of a lot of what would be handed down would be surrounding Aboriginal people. It's not a matter of saying the information was just conveyed through lots of - Aboriginal people experienced the landscape and received information through an oral tradition that explained that landscape and their role within the landscape and the cosmos.

Q. I know I keep repeating this, but if you feel that any of your answers are going to encroach, as it were, upon section 35, would you be able to indicate that to me.

A. Yes, I will indicate it.

Q. As I understand what you are saying, there is an oral tradition, but there is one constant in that, which is the landscape itself, which doesn't change.

A. The landscape is changing. It is an evolving thing as much as Aboriginal culture is changing, and there are basic elements in the landscape, such as Rocky hills and things that may not be moving, but, particularly in an area like the Lower Murray, we are looking at massive
change within generations - just a couple of generations
of people.

Q. But what you do know is that the Aboriginal community
had no means of putting a record of their cultural
knowledge in any durable way.

A. Their rock art is one example, whereby symbols which
appear on - even appear on trees and things, but there
are symbols that are painted onto rock shelters and are
there for some level of interpretation by generations.

I am not putting that forward as a major way that
information was conveyed, but you seem to be pushing
towards me to say that there is an oral tradition and
that was the only tradition. I am just saying it is a
little bit more complicated than that. Although, I
accept that interaction between people, particularly
during dance ceremonies and things, were occasions when
information could be handed on laterally, downwards,
whatever, with some degree of modification.

Q. But even rock symbols, although there is something which
is pictorial, described in an enduring form, need the
interpreter. The significance of the symbol requires
oral interpretation, does it not.

A. Yes, and oral interpretation doesn't come just from
within the group. We are looking at a situation where
Aboriginal cultural groups are moving across the
landscape in relation to environmental and other social
factors. So you have got new traditions coming into new
areas and supplanting themselves and, in some cases,
incorporating other elements. It is not just a matter
of receiving information from an elder of one's own
group. There is quite a bit of information that is
being exchanged at ceremonies and things.

Q. Is it fair to say that interpretations and
re-interpretations are inevitable in any tradition, but
perhaps particularly an oral tradition.

A. That's right.

Q. Because, as I understand your evidence, in the
traditional past of an Aboriginal community -
A. I don't recognise a traditional past. I would say, if you have read part of my statement about mission cultures, that contemporary culture has traditions just like earlier cultures had tradition. So I don't accept that you would put forward traditional culture as pre-European as distinct from everything else.

Q. Because tradition is an evolutionary process. It is not simply something that has happened in the past.

A. I wouldn't say it is evolutionary. That implies that there are better forms coming out of weaker forms.

Q. I will withdraw that word. It is a changing process.

A. It is a changing process, but the rate of change can change as well, depending on what the social environmental factors are.

Q. So there is a change in tradition that reflects the attitude of a particular community from time to time, and community values and that sort of thing.

A. These changes come about in fairly complex ways and may not even be acknowledged by communities of there having been a change. So it really depends on what level of change you are talking about. There can be deep sort of structural changes, and there can be relatively minor changes or realignments of facts making up a particular tradition.

Q. Perhaps you could just explain to me if it is possible, in general terms, the mechanism by which that change takes place.

A. In the context of the Lower Murray - and I'm steering well away from things cultural, because I am aware of the problems with Section 35 - but such an event as small pox, for example, which wiped out a significant number of people - it is difficult to know how many, but maybe we are looking at 60, 70, 80 per cent of Lower Murray people during those two waves of small pox - that would have put a lot of pressure on the survivors of that episode in terms of shortening their mortuary rituals and other practices which were really based on a much larger number of people. Clan boundaries and
things like that, you would also expect to be modified
from time to time, depending on the particular fortunes
or misfortunes of particular groups within the Lower
Murray. So I see it as something that is changing, but
the broader - the deeper parts of the culture, in terms
of their relationship with the dreaming, would be
something that wouldn't change - wouldn't as readily
change. There would be modification in terms of some of
the facts in the dreaming, but not necessarily to the
main dreaming itself, particularly if a dreaming story
such as Ngurunderi is so heavily imbedded in the
identity of Lower Murray people.
Q. The interpretation by a community of certain matters
can also change, can it not.
A. I wouldn't agree that a community would have an
interpretation as a community on many of the aspects of
say a dreaming story. You would find that, although
the general story line would be adhered to by everybody,
there would be various forces within the community to
say that such and such an event happened here, rather
than other clan groups within the Lower Murray who
would disagree and say that it happened in their area.
Q. So there would be varying interpretations within a
community from time to time.
A. Varying interpretations of the detail of a myth within
that sort of broader community, but the myth would still
be readily identifiable throughout the community.
Q. Earlier in your evidence you talked about re-writing
history. You said, in effect, you were engaging in
that yourself.
A. I should qualify that re-writing could be taken two
ways. I used it in the context of introducing new
evidence that had been gained in a scientific approach
and, therefore, I was improving an existing history
which had not accounted for the facts that came about
through my empirical exercise. So that is what I was
referring to. In a sense, I was editing history rather
than coming up with a totally new paradigm in history.
I was introducing facts that I am arguing have not been accounted for. But I don't say that the facts that I come up with are necessarily all the facts that might relate to the general issue, the general area I'm writing in. But I was not re-writing in the sense of dismissing facts that other historians had already come up with. My re-editing, which is a better way of looking at it, was incorporating the existing facts and adding to those facts, and then coming up with what I consider a more informed narrative. It doesn't imply that I reject the facts that other historians had come up with for their particular treatment.

Q. But you said, I think, that they used the past and recorded the past selectively because of their own particular perception of what was significant and what was not.

A. Yes. The particular historian that I mentioned, with the benefit of more facts available, I think that criticism of mine was valid. Had he had the benefit of reading my work, then, of course, his account would have been quite different. So it is a fact of life that We all stand on the shoulders of people who have worked before us.

ADJOURNED 1.01 P.M.
RESUMING 2.23 P.M.

Q. When we adjourned, we were talking about oral tradition. Do you agree that, generally speaking, oral tradition is transmitted vertically from one generation to another.

A. No, I don't.

Q. Why is that.

A. Because the information can be and often is preserved laterally. It's not just a movement down a lineage from one level to another, although that would be a primary movement. But even having said that, it would not necessarily be from father to son, or mother to daughter. There are combinations such as grandmothers to granddaughters, uncles to nephews, depending on what the information is. But, in secret sacred information, it is more likely to be discussed among men who have, in the case of male secret sacred information, who have already reached a certain initiation status. I'm talking in terms of the Central Australian material.

Q. I simply had in mind in an older generation to a younger generation. Logically, it seems to me that that must have been the major process of transmission; do you agree with that.

A. If you are talking about net movements of information, that could well be the case. Even there, you have got information coming in from different areas, so I don't want to put forward a simplistic model that things are being, you know, just moving in one direction.

Q. But it is a teaching and a learning process.

A. A process whereby even the teachers are gaining more knowledge of the dreaming as its being revealed to them.

Q. Revealed to them by what or by whom.

A. Revealed to them by their own, well, dreams in some cases. Revealed to them through talking to other senior people, that type of process.

Q. That suggests to me that there is a continuing process of acquisition of knowledge.

A. Acquisition and transference, checks being in place for
certain information, those checks being explored, the
landscape changing. That - you know, that could
initiate certain events that senior people in a culture
would have to come to terms with when we are talking
about a whole complex of interactions, so.

Q. Aboriginal beliefs are related to the landscape to a
large extent, are they not.
A. Aboriginal beliefs? In what part of their beliefs are
you talking about?

Q. Any parts of their beliefs, their traditional beliefs.
A. The type of traditional beliefs? I've said that there
are old traditions, new traditions. What part of their
beliefs are you talking about?

Q. I don't want to go too far down that track.
A. I make the point that you are asking a question that
doesn't have a simple answer, because the nature of
their knowledge is fairly diverse.

Q. I think Miss Nelson might be concerned about going into
detail which is going to get us in problems.
A. Yes.

Q. I'm happy to come back and cover it in more depth when I
apply to have the court closed to the public, as I will,
of necessity, have to do at some stage. So I'll leave
that topic. It seems to me that your evidence as a
whole suggests that there is a passing on of knowledge
within a community from time to time, generally from the
more senior people to the younger people in the
community. Now, do you agree with that so far.
A. Yes, so far.

Q. It also seems to me that you suggest that there will be
some differences within an individual community in terms
of the perceptions of different factions of that
community.
A. Depends how we are defining `community’. If we define
it as all the Lower Murray people in a pre-European type
Q. Then, there is the perception of the person transmitting that piece of knowledge which may affect what is told and how it is told and the interpretation of certain matters.

A. An individual could reveal different parts of a story, depending on who they are talking to, what time of their life, or, indeed, the local politics that they are immersed in at that time.

Q. There may be an interpretation of the material by the receiver of the material which reveals some sort of, sort of subjective perception on his or her part, maybe not.

A. The receiver of that information, to a large extent, has already had their world view shaped by that culture. So that would, that shaping or a precondition, if you like, of that person before receiving the information would tend towards acting as a check towards change that was outside of, you know, the general beliefs of that cultural group.

Q. Information received by an observer or a recorder of that information outside of an Aboriginal community would be interpreted as against the cultural background of that observer, would it not.

A. I'm sorry, you will have to run that past me again.

Q. I'll try again. When you or anyone else go along to someone and receive information, it's a question and answer process basically, isn't it, however you do it.

A. No, it's not. Much of the information in my thesis that comes about through participating and observing. Participating in the sense that, or to a degree whereby I've become part of the woodwork in the situation, if you put it that way, and that I'm - I am an observer pretty much along the lines of Aboriginal people who are also observing certain events. However, I recognise that my anthropological training would - with anthropology as a tradition and having an outsider's perspective would lead me to come out of a situation where I'm observing cultural activity with a different
perspective than the people participating, or other
observers who are Aboriginal and who are in the vicinity
of that cultural action.

Q. What you have been discussing, that is all covered in
published anthropological work.
A. Yes. There is quite a bit of material on that.

Q. Your approach to everything and, indeed, everyone's
approach is against your own cultural background, isn't
it.
A. No, I don't see there being a dichotomy of contemporary
Aboriginal culture versus - or, in my case, middle-class
white culture. As I stated and laid out in my
statement, contemporary Aboriginal culture is as much a
product of its pre-European forms as it is in terms of
that contemporary culture being a product of its
interaction with Europeans over the last, roughly, 200
years. We cannot look at contemporary Aboriginal
culture without recognising and considering the
interaction that it's had and the influence that it's
had from its non-Aboriginal forces that have helped to
shape that culture.

Q. That may be right, but you also, as a person with
certain views and beliefs, have been shaped by the
tradition in which you have been brought up; isn't that
a fact.
A. There is one of several factors that would influence my
perception of what is going on. The fact that I
personally have access through my marriage to an
Aboriginal woman of that group, I have access to an
insider's interpretation of that culture is something
else that I can take account of. I'm not saying that I
incorporate those views as objective anthropological
data, but I would incorporate those views as cultural
artefacts which are worthy of being part of the raw data
that I would utilise to come up with a model of what is
happening.
Q. Is it fair comment to say that some of the earlier recordings of Aboriginal culture and tradition suffer from the cultural attitudes of the people who recorded it.
A. In general terms, that’s a fair statement.
Q. In fact, considerable criticism has been levelled by more contemporary anthropologists at those people who did record or purport to record, say, in the 19th century.
A. There are good examples and bad examples of ethnographers from last century. I would hesitate to put all recorders of Aboriginal culture in that same category. However, even knowing that some recorders have particular biases, we are, through recognising those possible biases and the data today, able to some extent to take that into account and use their data, you know, to shed light on some cultural behaviour that we might be studying.
Q. That recognition of bias is a relatively recent recognition, is it not.
A. How recent are you talking about?
Q. Say, within the last 40 years.
A. Previously, anthropologists tended to study quite different aspects of Aboriginal culture, so much of the writing today is, in terms of Aboriginal culture, looking at quite different aspects. So, it is difficult to compare too closely the anthropologists who were working earlier this century who were intent to describing as much as possible a pre-European Aboriginal culture, whereas work from around the Second World War onwards tended to, particularly after the Berndts’ field work in the Lower Murray, but work tended towards looking at Aboriginal people as they were being incorporated into society based in rural towns and missions, and Adelaide itself. So, would have got different phases of the literature. I would hesitate to compare them too closely in terms of who is right and who is wrong. I don’t think that is the issue.
Q. I didn't put that forward as the issue. I was
suggesting there were certain deficiencies in earlier
anthropological recordings because of the attitudes of
the people recording the information.
A. I would go the opposite way and say that in some cases,
the first ethnographers came up with perhaps better
records for some aspects of Aboriginal culture precisely
because they were people who were not heavily embraced
by a particular discipline. Observers and some of the
early missionaries are in this category whereby their
records are simple observations without too much theory
being, or that data being embedded in theory. They have
come up with data that today is quite useful for
re-analysis.
Q. But the early observers were men whom you wouldn't
expect them to have access to any knowledge of secret
women's business.
A. Some of the early observers were women. And also those
men had female relatives who were observing for them; in
particular, George Taplin refers to observations that
his wife made. You can have access to those in the
Taplin journals.
Q. The Reverend George Taplin was a missionary and he
established Point McLeay Mission Station in 1859.
A. That's right, he was a missionary.
Q. He was concerned to convert the Aborigines to
Christianity, was he not.
A. That's correct.
Q. He had certain attitudes towards their society and
aspects of it which he considered to be immoral.
A. There were some aspects of that society he considered to
be against his ultimate aim of Christian conversion.
Q. Would you agree with this comment: That he did his best
to destroy Aboriginal culture as a living culture.
A. I think that's a generalisation that I would hesitate to
make. It's a definitive statement and I don't think all
of his actions would be explained by it.
Q. It's a definitive statement made by Catherine Berndt in
this book that was tendered `Women, Rites and Sites' in
the chapter she wrote which is entitled `Retrospect and
Prospect, Looking Back Over 50 years'. I take it you
don't agree with that.
A. It's a matter of emphasis, it is not a matter of whether
I agree or disagree.
Q. She went on to say: `Its place' - that is Aboriginal
culture - `As he saw it was in the past surviving an
only written account of what had be done there before it
was replaced by Christianity'. I would have thought
from the evidence you have given about the changing of
tradition and interpretation that you would perhaps have
agreed with that.
A. If you are talking in a general sense about their
culture being to do with initiations and if you were, as
Taplin obviously did, trying to convert their
mythological or helping in the conversion of
Ngarrindjeri mythology into a Christian mythology, you
are correct. But there are also other aspects of their
culture that Taplin was actively engaged in in
recording; and part of his personal fortune of becoming
a collector of ethnographic data was in the area of him
being able to talk to knowledgeable people. So, his
ultimate aim being one of Christian conversion for all
the Aboriginal people is quite clear, but I don't think
that, for example, that he was so against the religion
that he couldn't record it. So, against the culture
that he didn't, couldn't record it - I mean, his records
of Ngarrindjeri culture are very important. They are a
crucial part of the evidence for certain practices that
we do have today.
Q. Nevertheless, he ignores some aspects of culture, does
he not.
A. What aspects?
OBJECTION    Mr Abbott objects on the ground that
the witness should be shown the book and
be able to read the whole text being
quoted.
1    EXHIBIT PRODUCED TO WITNESS
2    Q. I was asking you some questions about Taplin. He was a
3        missionary there for some 20 years, wasn't he.
4    A. That's correct.
5    Q. I was suggesting to you that his recording of Aboriginal
6        culture in that area is significant in what it does not
7        record.
8    A. That's a suggestion that until you come forth with more
9        information, I couldn't agree with.
10   CONTINUED
Q. To start with, he doesn't record aspects of the women's area in the religious ceremonies, does he.
A. Part of his work was, in one volume that he published, a series of surveys that he sent around all over South Australia, but he also filled in that survey, as it related to the Lower Murray area. And, if my memory serves me correct, and I can check this, if I am allowed, part - one of those questions did refer to ceremonies.
Q. It is suggested, by some of the more contemporary ethnographers or anthropologists, that the work of those earlier recorders of Aboriginal culture is defective, because their own perception of the role of Aboriginal women is contaminated by their perception of the role of women in European society.
A. Who are those ethnographers who suggested that, contemporary?
Q. I think I suggest to you that Faye Gale makes that observation.
A. Faye Gale's paper utilises the information gathered from a man, Edward John Eyre, from the Mid Murray. She used information, gathered from a male ethnographer, to modify her model, or the model that she perceives in relation to the role of Aboriginal women.
Q. That is certainly true; and what she says is this, if you would like to look at p.124 of that book, Exhibit 11, at the fourth paragraph 'Other observers with more opportunity to obtain further details than Sturt could have done also give us little insight into the position of women or of their religious or ceremonial function. Undoubtedly the fact that all the early observers were men would have prevented them from exploring much of the secret life of women, but, as Eyre has demonstrated, there is much that men could have observed had they cared to do so. We can thus only assume that the early British inhabitants of the southern areas of South Australia had cultural blinkers that prevented them from seeing what was in front of their very eyes. It is
undoubtedly this cultural blindness that has remained until the present-day rather than the mere fact of the maleness of the observers.' Do you accept that, as an appropriate view.

A. I would accept the general points that she has made.

Q. And she goes, at p.125, to comment that even when women did begin to write about Aboriginal people, they didn't seem to be seeing any more than did their white male counterparts. Do you see that, in the fourth paragraph there.

A. Sorry, what paragraph?

Q. P.125, I have described it as the fourth paragraph. The line beginning 'Unfortunately none of the earliest writers were women, however even when women did begin to write about Aboriginal people in southern South Australia they did not seem to see any more than did their white male counterparts. In fact, most fieldworkers in the second part of the 19th century in the southern part of the State were missionaries or "philanthropists". Their concern was more with "rescuing" Aboriginal women than with recording their "pagan" beliefs.'

A. Nevertheless they did record those beliefs. So, there must have been interest in providing Aboriginal beliefs that they had observed providing accounts of those to the broader public of South Australia as well as the growing academic anthropological disciplines based in the northern hemisphere.

Q. Faye Gale makes that concession, though, does she not, in that paragraph where she says that 'Mrs Smith gives some insight into areas not recorded by the male ethnographers of the time.' Do you see that sentence.

A. I see that sentence, and I am quite familiar with Christina Smith. That is the 'Mrs James Smith' that is listed here. Her real name is Christina Smith. I am quite familiar with her records and I am not sure that she is quite as unique as is being suggested in this paragraph.
Q. You see, isn't the point that Faye Gale is making this; that Mrs Smith, and the other female early writers, do not discuss Aboriginal people, or record their tradition from a cultural or traditional viewpoint.

A. I am sorry, I have lost the point again. You are saying that Christina Smith is unique; is that what you are saying?

Q. No, I am not saying that, at all. What I am suggesting is that Faye Gale, in this article, is making the point that, first of all, the early writers, male or female, had cultural blinkers, which prevented them from seeing certain aspects of Aboriginal tradition. Therefore, it is not recorded.

A. I am saying that, although those cultural blinkers are there, it is more a matter of how the emphasis is placed in the writing, rather than suggesting that those cultural blinkers would make whole Aboriginal practices invisible.

Q. Are you saying that Mrs Christina Smith and writers of that era did, in fact, record, particularly from the point of view of women, accurately cultural practices and beliefs.

A. I would say they are no more - in general, no more accurate or in error than their male counterparts.

Q. And their male counterparts, because of their own cultural standpoint, did not accurately record - because they left out certain aspects - Aboriginal culture and tradition: is that not the point that is being made.

A. I mean, you are assuming, of course, that it is possible for a researcher to come in and record a whole culture. Culture is such a big and diverse thing, that it is not possible for anyone to come in and record every aspect in detail. So, we have to rely on people's attempts at coming up with an overview of that culture. And, initially, much of the emphasis was in terms of language and what is described as manners and customs, because people were interested in those aspects of Aboriginal culture that would either inhibit or, in other cases,
make easy their Christianisation. So, I would say that firm bodies of knowledge relating to secret sacred women's business would have been recorded, because they would have been considered - that would have been considered necessary data for the first wave of ethnographers who were the German missionaries. It would have been crucial knowledge towards them understanding the culture enough to then gain their Christianisation process.

Q. The primary agenda was to convert these people to Christianity; isn't that your understanding.

A. No, not entirely. That was part of it. They also - there would also have been an attempt to create, out of the indigenous population, a working class, which could then be incorporated into the economy as a labour force. So, I mean, they had practical requirements for the study. It wasn't all just interests of men in their spare time. There was a practical need for doing these studies.

Q. Apart from creating a workforce, the significance, as you saw it, of them gaining some understanding into, let's say, secret women's business, sacred secret women's business, would be in order to understand it in order, basically, to eliminate it, because that would hasten the conversion to Christianity.

A. We are talking theoretically, of course, here, because I am arguing there wasn't secret sacred women's business in the Lower Murray, but -

Q. At all.

A. But there may well have been aspects of that that they may have wanted to encourage. I mean, we are dealing with a hypothetical situation here.

Q. Is it your position that there never existed, in the Lower Murray, any sacred secret women's business.

A. On the basis of all the information we have, to this point, I would have to say, yes.

Q. Do you think you have got all the information.

A. In my thesis, I refer to over 500 works. It would be
rather bold of me to suggest there wasn't one or two
pieces of literature still out there. However, I
consider that I have covered all the major sources of
ethnographic information at present known to exist in
relation to the Lower Murray.

Q. This is all information that has been recorded by
someone else.

A. In my thesis, two whole chapters consist of my own
ethnographic material, plus significant chunks of other
chapters, as well. So, I include myself as an
ethnographer on the basis of all the field work I have
done through my work history that you outlined for me
earlier.

Q. Do you accept that, with the influx of European - I
hesitate to use the word `civilisation', given the
current state of affairs in the world. I will use the
word occupation, disrupted the transmission of knowledge
in the Lower Murray.

A. The effects of European intrusion, if we call that, into
the Lower Murray was felt differently in different
regions, just because of the process by which Europeans
entered. However, there were phases of that European
absorption of the Lower Murray that would not
necessarily have negated the possibility of preEuropean
type information being passed on. I am thinking now of
the period in which the Lower Murray was dominated by
large stations and that Aboriginal people were,
particularly around the lower lake, given free range
over some of the larger stations to camp in areas
whereby - which did relate to areas where they had
camped in preEuropean times. However, as I have stated,
by the time of the 20th century, the European absorption
of the landscape was at a phase whereby the Closer
Settlement Act broke up most of the big stations in the
early part. Aboriginal people, through the Aborigines
Act of 1911, were forced on to stations. And, later,
from about the 1920s through to the 1940s, the river
system was drastically altered through, first of all,
locks being placed on the river and then the barrages
which were completed in about sort of 1940. Does that
answer your question?

Q. Partly, but you earlier spoke of the small pox epidemic.

A. That's correct.

Q. And you said that your belief is that perhaps up to 80%
of the population perished, as a result of that.

A. That's right.

Q. It follows then, doesn't it, that there would have been
fewer people who had the knowledge, able to pass it on.

A. Are you talking about statistically fewer people, or
fewer people, in total?

Q. Let's leave statistics out of this.

A. No, it is important in the fact that, obviously, if you
have got a smaller population, you don't need as many
people with that knowledge to keep passing it on, but,
if you have got a larger population -

Q. But you have got fewer recipients, too.

A. That's correct, yes.

Q. The reason I suggest you keep statistics out of it is
because I don't understand any statistical data to have
been collected, at that time.

A. Sorry, at what time?

Q. When the small box epidemic went through.

A. No, we have only got the estimates that archeologists
could provide.

Q. Based on those estimates, is it your view that it would
follow, of necessity, that there were fewer people who
were the custodians of traditional knowledge, able to
pass it on.

A. Is this after the small pox?

Q. Yes.

A. Initially that would have been the case, I would
imagine, yes.

Q. Then is it the case that the intrusion of the
missionary, to some extent, affected the transmission of
cultural beliefs.

A. If you are talking about the first missionary, H.A.E.
Meyer, I don't think he would have had much impact. His mission was, at that stage, essentially on the frontier at Encounter Bay. He was there very early, from the late 1830s to the first years of the 1840s, he was teaching the Aboriginal people basic skills and, through that, he recorded manners and customs and language. The number of people passing through his school were probably a very small percentage of the Lower Murray people who were alive, at that stage.

Q. What about those who followed Mr Meyer.
A. There is a big gap after Meyer when George Taplin arrives on the scene setting up the mission, as you have already stated, in 1859. By that time, Aboriginal people had become or many of them had incorporated themselves into things like the fishing industry, cutting wood for paddle steamers and Aboriginal people were being employed to help with the harvest. So, throughout Taplin's lifetime - and he died in 1879 - again, he only had a small percentage of the total Lower Murray population, at any one time on his mission. And he had very little coercive powers, in terms of keeping them on the mission. That, of course, changed a lot after his death in the advent of the 20th century.

Q. It is true, is it not, that Taplin, notwithstanding his missionary work, was one of the earlier recorders of Aboriginal cultural beliefs.
A. No, I would consider people like George French Angas and Richard Penney and Meyer being more important in the sense of recording a pre-European type culture. By that I mean people who are moving around the landscape more or less at will without being overly restricted by European land acquisition. So, all of those people I have mentioned relate to the late 1830s/1840s. It is a big jump then to George Taplin in 1859.

Q. But, apart from the fact of European land acquisition, which would have inhibited the ordinary living habits of the Aborigines, the impact of the missionary was significant, was it not, in disturbing their usual way of life.
A. No. It is quite clear, through the Taplin journal, that Aboriginal people took advantage of the resources that the mission had, to drop in when they were on the way from say Mundoo Island through to Wellington or down the Coorong. So the fluctuation in the population level of Point McLeay was enormous, just because there was quite a bit of activity going on and people were more or less using it as a roadside cafe, in the sense they were stopping there for a while, sometimes engaging in cultural activities, such as bartering and settling disputes, and then they would move on.

Q. Were Taplin’s observations confined to what he observed at the Point McLeay Missionary station.

A. Yes, largely. Later on in the period, when he was at Point McLeay, he sent some trained Aboriginal preachers out to Mundoo Island and down the Coorong, but he tended to restrict himself to the mission, and his records largely refer to events on the mission property or neighbouring properties.

Q. To that extent then, there were certain inherent inhibitions upon the type of knowledge that he acquired, were there not.

A. With such a wide diversity of Lower Murray people passing through, I would say that, even being in one spot, he was still being exposed to variation, cultural variation, from within the extended Lower Murray community. He was also interacting with George Mason, particularly early on, who was established at Wellington.

Q. Faye Gale suggests that reading the work of Taplin teaches us little about the religious and ceremonial roles of Aboriginal women. I will take you to the precise reference, if it is necessary. But if you accept that is an accurate observation of what he says, do you subscribe to that view or not.

A. I would subscribe to it as far as saying that he never probed too deeply in any particular aspect of the culture. What he provides is an overview, and, as an
overview, it is quite useful. But he was not a trained
anthropologist. He was a lay anthropologist or he was
an ethnographer, a collector of data.
Q. Looking at p.126 of Faye Gale's article `Roles
Revisited', she says in the last paragraph `However, we
learn little about the religious and ceremonial roles of
Aboriginal women. Taplin leaves us with the same
impression that most ethnographers, until very recently,
have given, namely, that women were largely irrelevant
in the whole religious spiritual sphere. Indeed, as one
seeking to convert the people away from their own
religious beliefs and practices, he saw the women, whom
he assumed had less religious involvement, as easier
targets than the men.' Do you agree with that
observation.
A. I think she has probably put too much emphasis on it, in
that, although Taplin deals with male initiations to
some extent, it is in no way the same sort of detail
that the Berndts provided. But I would accept, as a
general point, that Taplin himself had more luck - if
that's the word - with Aboriginal women. That may well
have been through the role of his wife or - it is very
hard to actually draw much out of that actual quote.
Q. I thought that the point that Faye Gale was making was
this: That until very recently, ethnographers have not,
for various reasons, recorded or obtained much
information, if any, about the religious and ceremonial
roles of Aboriginal women.
A. And until recently, that covers the Berndt period as
well, doesn't it? Because I would find that -
Q. I include that because Faye Gale is making this
observation, is she not, in 1989. That's when this book
was published.
A. We don't have an abundance of knowledge about
initiations and religious and ceremonial business if we
take the Berndts out of the equation. We have got an
indication of some of the terminology and some of the
mechanics of the initiations and the fact that they
existed, but in terms of anthropology - that's why the
Berndts record is so important, just because that detail
is in there in relation to the Lower Murray.
Q. Why is it that until we get to Berndts, which is the
early 1940s, we don't have that knowledge.
A. Anthropology has gone through many phases since it sort
of came about in the 1850s and the 1860s, and it would
have taken a while in this century to recognise that
there were still knowledgeable informants about the
Taplin period. There was an enormous push from lay
anthropologists or data collectors to go out and collect
all the data that was about, and then things tended to
lapse a bit, with the assumption that there were no more
- and I use the word with reservation - traditional
people, that is, people who the anthropologists would
regard as pre-European in terms of their world view. So
the Berndts came along, as did Tindale, and found that
there were some knowledgeable informants, and then
started another period of field work just prior to the
Second World War, and, in the case of the Berndts,
through the Second World War.
Q. Is this what you are saying, that the information about
traditional beliefs is restricted, first of all, by the
number of informants that are available, or whether
there are any informants available.
A. It would only take a few informants, if they were
widespread through the Lower Murray, to get something of
an overview. We would have to look at what part of the
country the informants came from. In the case of the
Berndts' study, they had several people who defined
themselves as Yaraldi. Therefore, there is a strong
case that they have covered the basics of Yaraldi
society, but their informants wouldn't have known as
much about the Coorong area. But Tindale had tended to
work mainly with Coorong informants. So I wouldn't want
to make a general statement about how many informants he
would need. Naturally you would try and get as many
informants as possible. If it meant talking to
everybody in the community that had knowledge, then you
would do that. That seems to have been the approach
that Radcliffe-Brown took in the early part of this
century, when he went to Point McLeay and set up his
model of social organisation in terms of Australian
tribes, as he called them. He set about to interview
every possible informant that he could in terms of
coming up with a map of where people were living and
what the names of the so called tribes, or lakalinyeri,
as others have called them, as they were spread through
the Lower Murray region. So I would say that you need
more than just a couple of informants, but if you are
dealing with, as the Berndts were, a memory culture,
then you just have to be content with the informants
that you have access to.

Q. Does that mean that the information that the Berndts
collected was limited by the number of informants they
had and the memory of those informants.

A. They were limited in the fact that they were describing
a culture that was a hundred years down behind them.
They make it quite clear that they are dealing with a
memory culture. In fact, Albert Karloan and Pinkie Mack
were describing events and practices that they had just
heard about in their own childhood. So the Berndts
considered that they had access to the main informants
on Yaraldi culture, and Yaraldi culture being something
that they were describing from the point of view of its
pre-European type characteristics.

Q. If your object is to record Aboriginal cultural beliefs
in any designated area, why do you need more than a
couple of informants.

A. As I stated when I was giving an overview of the
methodology for an anthropological report, an
anthropologist would be obliged to get the full range of
opinion that would be available or exists on various
aspects of the culture. No one person you would trust
to have all the information, because that one person
will have particular links to particular descent groups
that may have slightly different versions of particular
dreaming stories. So you are really obliged to,
certainly if you have got the time and you are doing an
ethnography as distinct from a report produced for a
particular reason - if you are studying a group of
people, then you would have a vested interest in
obtaining as much information from as many people as
possible in order to plot the boundaries of knowledge
within that community.

Q. The Berndts' field work in the Lower Murray was done in
the early 1940s, is that right.

A. Yes.

Q. Although their book isn't published until 1993 or
thereabouts, they were relying on data that they
acquired in the early 1940s.

A. They acquired the data in two blocks in that early
period. Berndt describes how his first attempts with
Karloan came up with mixed results, but after Berndt had
gone away and presumably come back with Catherine,
Berndt had gone away and become a trained
anthropologist, Karloan remarked that Berndt was now
able to ask the questions that he wanted to answer -
words to that effect. So although the Berndts were
possibly worried about the quality of their earliest
data, they were trained anthropologists when they had
finished collecting that 1940s data.

Q. I just want to be clear. All of the data was collected
in the 1940s, is that your understanding.

A. All of the Lower Murray data was collected then, but of
course they had opportunity to do field work in other
places in order to develop their overview of what was
unique in the Lower Murray.

Q. In relation to information that they acquired of
traditional culture in the Lower Murray, their
informants seem to have been Albert Karloan and Pinkie
Mack almost exclusively, do they not.

A. No. Mark Wilson gave them information. I think you
will find in the Berndt ethnography that they got
information from a person named Frank Blackmoor, and
there had been opportunity to talk to other Aboriginal
people such as the person they call Clarry Long but we
know in the museum as Milerum. So there were some
conversations they had with the Coorong man. Also, they
would have had contact with other Aboriginal people who
had been exposed in some way or another to Lower Murray
culture, such as Barney Warrior. I mean, I accept that
the bulk of their data was from Pinkie and Albert, but
they did have the chance to explore the extent of that
literature and the consistency of it with other
Aboriginal people.

Q. You said earlier in your evidence last week, that
Karloan and Pinkie Mack seem to be the only people who
have that particular knowledge that was recorded. I am
not using your exact words. Is that your impression
from Berndt's work.

A. Berndt made the comment that people like Mark Wilson had
knowledge of the culture, but wasn't initiated and
didn't speak Yaraldi fluently. So although Mark Wilson
would still have been an important informant, he was not
considered to have the type of knowledge that Albert
Karloan and Pinkie Mack had.

Q. You really have to take Berndt's word for that state of
affairs, don't you, that is, the extent of Pinkie Mack's
and Albert Karloan's knowledge and what other knowledge
might have existed.

A. Given that they are social anthropologists of high
calibre, until I have knowledge that they were wrong, I
do accept their statement.

Q. I understand that. It is the position, isn't it,
though, that Catherine Berndt makes a point of saying
that when she first started working with her husband,
she didn't appreciate how important it was for her to
align herself with the women, and that until she
understood that, she felt that perhaps she didn't get as
much information as she might otherwise have done.
A. I am not familiar where that's written, but I could well imagine from my own field of work that there are certain situations which would create what they call in Aboriginal, English shame. So, therefore, it might be embarrassing to talk about some things with your spouse there, or someone who is not a close relative, or maybe in some situations with a close relatives. It is fairly complicated exactly what would be spoken in what situation. But I accept that Catherine Berndt would have been feeling her way around in terms of developing field work techniques, as she would have been fairly new to the anthropology game back in the - circa 1940.

COMSR: Mr Smith has covered a fair bit of this area. I am just wondering how much of this particular line of cross-examination is needed to be covered.

MS NELSON: I don't think, with respect, that Mr Smith - I don't want to be rude about it - really explored the difficulties that have been encountered until very recently.

COMSR: I understand that that is what you have been doing, you have been exploring them. It is just that I am concerned that we don't cover the same ground twice, given that we have to -

MS NELSON: I am conscious of the time limitation. I am really not asking questions for the fun of it. I don't want to leave the area inadequately covered, because I think that would be most unhelpful.

COMSR: If you feel there are areas that we haven't touched on at this time.

CONTINUED
Q. There are areas, are there not, of knowledge which are not spoken and they are not publicly expressed when we start talking about secret sacred business.

A. Perhaps defined as, you know, circumstances where you have got, you know, a mixed group of people of varying age, gender, race, I would accept, yes.

Q. There are areas where women will not communicate to a male observer knowledge of sacred secret women's business.

A. Which area of Australia are we talking?

Q. Let's talk about the Lower Murray.

COMSR: I'm a bit concerned we don't get into too much -

A. The answer is easy: I don't believe there is secret sacred women's business in the Lower Murray.

Q. Why do you say that.

A. It's in my statement. My own reading of the ethnography, my field experience, all of that. It would take me an hour to go back over that.

Q. You talk about your field experience. If such a thing existed, do you really think that the women who had that knowledge would tell you as a male outsider.

A. You have jumped from the point of whether I would know whether secret sacred women's business existed to the point of whether I would actually hear that secret sacred women's business.

Q. No, I hadn't. I'm simply asking you whether you would expect those women to tell you of its existence, never mind about the details.

A. I would expect that in some manner, I and other Aboriginal people in that community would be given the knowledge that it at least existed, even if it was just to the extent of us not embarrassing them by probing into normally areas of their culture that might offend them.

Q. How would you, as a field worker, establish that you
were intruding into an area where you might embarrass them by further questioning.

A. My informants would find ways of making it quite clear. Even if it was to the extent of warning my wife or another person that I worked with that it's best that I not take a certain approach of questioning, or that I not be around on certain occasions. But I've not had that experience so, therefore, I assume, as I've just stated, that the secret sacred women's business does not exist.

Q. Have you, in your field work, sought to ask people about that.

A. It's not a good field work technique to just turn up and start asking questions like that. Aboriginal people from all over Australia will make it quite clear that you get information at various stages at various times and when the context is right and when my credentials, as someone who can be trusted, have been established by them. Or, there may need to be something that would, some people that would need to relay that information on rather than to others, so it's quite complicated.

Q. Do you concede the possibility that perhaps you haven't been in the right place at the right time to be able to access that type of information.

A. No, I wouldn't concede that. I would say that - again, I would say that if such information existed, then I would have been at least told of its existence, or it would have been made apparent to me that it existed.

Q. In what context and by whom.

A. Since we are talking hypothetically, it's difficult for me to come up with a hypothetical situation that would explain it. But it would be made obvious. It would be made obvious to me that such information existed, even if it was just to the extent that I shouldn't ask certain questions on certain topics or go to certain parts of the landscape or, you know, whatever. That hypothetical secret sacred, you know, women's business would be.
P.A. CLARKE XXN (MS NELSON)

Q. You made the point, and I think you have made it twice, that Catherine Berndt and her husband record that the gender bias in terms of ceremonial and religious matters in the Lower Murray is minimal.

A. And that's a point that they make and Professor Tonkinson in the foreword.

Q. That's not, of course, to say that separate secret women's business does not exist, is it.

A. I'm sorry, what was that question?

Q. When they say - I'll rephrase it. When they say that both men and women have access to religious ceremonial beliefs, they don't make that categorical statement, they simply say that the separation of men's and women's business is minimal in the Lower Murray, don't they.

A. I would think that would imply the former.

Q. When you say they say its minimal, don't they concede that there are some areas, they may not be large, but there are areas where they are separate.

A. No, I think you're wrong there. I think they are talking about emphasis that, say, a male would put on certain parts and a female put on others. I don't see that as separate at all; in the contexts, are still there.

Q. That's your interpretation, is it, of what they are saying.

A. I would have thought that was a reasonable interpretation.

Q. It is, of course, an interpretation which supports your particular approach, isn't it.

A. Yes, it is.

Q. Do you concede that there is another interpretation which is reasonable and that is: That they are saying that although there's not a lot of secrecy between men and women in the Lower Murray, there are some areas where there is secrecy.

A. No, I think that is taking it too far.

Q. The statement they make is, this is a statement made by Catherine Berndt at p.11: `Gender-based difference in
the sense of inclusion or exclusion in religion and
other affairs were minimal'. You say that should be
read as meaning that there are no gender-based
differences in the sense of inclusion or exclusion in
religion and other affairs.
A. I mean, you talk about division as I think it would not
be implied by her statement.
Q. Well, have a look at her article in that book at p.11.
Do you say that that statement that I've read to you
means that there was no area of traditional culture
where, for example, men were excluded from women's
business and vice versa.
A. How are we defining `women's business'? In anything
associated with women? I mean, there are a lot of
problems with that statement. I would look at it the
other way and say that that statement doesn't imply a
sharp division between the genders. Certainly in the
area of, you know, their cosmology and their secret
sacred knowledge, I have never argued that there isn't
women's business, but -
Q. You say it isn't secret sacred.
A. Sacred sacred women's business in the Lower Murray, yes.
Something could be religious without being secret
sacred.
Q. I understand the point you make there. The point you
made earlier in your evidence was that you reached the
position that there is no secret sacred business from
all the documented evidence.
A. That's correct.
Q. You go on to say `If it existed, it ought to be
documented'.
A. It's existence or, at the very least, ought to have been
documented.
Q. And documented by whom.
A. Documented by any of the large number of ethnographers
who have worked in the region, both male and female.
Q. Do you not concede that it may not be documented either
because their approach or their methodology, or whatever
1 you care to describe it as, or their ability to get
2 information has been impeded in some way.
3 A. No, I don't concede that. You have got a very fairly
4 big bunch of ethnographers there. I don't think that at
5 least the existence of secret sacred women's business
6 would have been entirely missed.
7 Q. It is the situation though, isn't it, that even in the
8 last four or five years you have become aware of matters
9 that you weren't aware of either in your own research or
10 anyone else's.
11 A. What matters are they?
12 MS NELSON: I am going to have to make an
13 application, I think at this stage, that the court be
14 closed.
15 COMSR: I will remind the persons in the hearing
16 that I'm constrained by the authorisations not to permit
17 certain persons in the hearing room while evidence
18 concerning Aboriginal traditions are being led. For
19 that reason, I'm going to have to ask you to leave the
20 hearing room while this portion of the evidence is being
21 examined, apart from those persons whom I earlier
22 indicated would be permitted to remain in the hearing
23 room.
24 ADJOURNED 3.39 P.M.

CLOSED HEARING

7.8.95

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HEARING OPENS

MS SIMPSON APPLIES TO INTERPOSE WITNESS, E.M. FISHER

LEAVE GRANTED

MS SIMPSON CALLS

ELIZABETH MARY FISHER AFFIRMED

EXAMINATION BY MS SIMPSON

Q. Mrs Fisher, will you tell the commissioner where you were born.

A. I was born at a place called Bracken Hill, Sheffield, England.

Q. When did you come to Australia.

A. In 1927. I was one year and five months old when we left the United Kingdom. I am now an Australian citizen.

Q. I think, during the course of your life, you came to know a woman called Gladys Elphik.

A. Yes.

Q. Can you tell the commissioner when you first met Gladys Elphik and how you came to know her.

A. Yes. It was in 1964 or 65. I was in the International Women's Day Committee and we had meetings at Port Adelaide sometimes, and a woman called Dot Edwards was always telling me about this wonderful Aboriginal lady that I must meet. One day she turned up at my place and said 'Come on, you're coming to see Glads'. So I went over and met this very tiny little woman who said 'How do you do? I'm pleased to meet you. You are going to write the story of my people', and I staggered back and said 'Am I?' And she said 'Well, I think we'll get along and see how it goes'. So that began a long friendship until Gladys died in 1988. From that time I took notes and made tapes. Gladys was born in Adelaide and lived - grew up on Point Pearce. During the time when I knew Gladys, she would have friends there and sometimes the friends were from Point Pearce, sometimes they were from northern South Australia, sometimes they were from Point McLeay.
Q. Just pausing there for a moment, before you met Mrs Elphik, did you have an interest in historical matters.
A. Yes. I - my father was always wanting to trace back the family history, and my mother knew a lot - well, something of her own family history, and I was always interested in history. I have read, in a kind of amateurish way, across various matters of interest in Australia. My mother had a respect for Aboriginal people and - does that answer the question?
Q. Thank you. You have told the commissioner that you were going to write a book about Mrs Elphik; is that right.
A. Yes. She asked me to write a book about her people which would include her own childhood at Point Pearce, about her grandmother, who was Kiednerto of the Nurrunga tribe.
Q. Did you begin gathering material in order to write that book.
A. Yes. I spent about 8 years going through old newspapers. I spent a long time, of course, with Glady on an irregular basis. I have - I wasn't a wealthy woman so I used what I had. I had a loan of a tape recorder at first, a very hefty old thing, which I still have, and then I got a slightly more modern reel-to-reel tape recorder and I used to drag that down to Glady's place and record, yes.
Q. I think you recall on one particular day, when you were talking to Gladys Elphik, meeting a friend of hers at her house called Rebecca Wilson.
A. Yes. I was only ever commanded by Gladys to come to her place on one occasion, but that was not the occasion. The visits would be like this: I would ring up and say 'Glady, I've got a free day, can I come down?' And she'd say 'Yes, you can come down', and I'd arrive and there may be a house full of people or Glady might be totally on her own. On the occasion that you refer to, there was a woman called Rebecca Wilson, a little, a tiny woman in stature. They were somewhat alike in stature but Glady was a little bit thinner than Rebecca Wilson.
Q. Did you come to know something more about Rebecca Wilson on that day, that is, who she was married to and where she had come from.
A. Yes. I had gone down there with a purpose. I had discussed on the phone with Glady that we examine the financial output and input, in and out, of Point Pearce as a government reserve, that was in fact a farm and mixed produce and so on, and that we would examine - and she had some statements from government figures on how much Point Pearce produced. We were having a discussion on those questions and Rebecca Wilson was present at that time.
Q. Can you tell the commissioner where you were having the discussion. Was it in a particular room.
A. Yes. It was always at Glady's table, her kitchen table, and I would put the tape recorder on the table and she would say - always she would say 'That's getting too heavy for you' and I would say 'Not too heavy'. That was always how it began. That had a meaning, you see. The meaning of that meant 'What I'm telling you is too much of a burden'. And what I was telling her by saying 'Not too heavy' was that it was no burden. That was a style of speaking where you don't sort of directly refer to things that are personal with Aboriginal people, unless they have given you great permission to do this.
Q. On this particular occasion which you have recalled, you were discussing financial matters to do with Point Pearce, is that right.
A. Yes, yes.
Q. Did Gladys Elphik leave the room for a time.
A. She went - she moved over to - the kitchen - she was in a small house, and the kitchen went around into her bedroom. The kitchen was a smallish, like this (INDICATES) and there was a table in this corner where we always sat, and just over there, across a passageway, was her bedroom. She'd move into the bedroom but she could still hear me, or hear us, and - yes, so she moved off to do that, yes.
Q. While she was in the bedroom, did you continue talking to Rebecca Wilson.
A. Yes.
Q. Did she have another name which you call her.
A. Well, she told me that her people called her Koomi.
Q. Could you spell that.
A. K-O-O-M-I.
Q. When you were talking to Rebecca Wilson, did you have the tape on.
A. Yes, I did. There seemed - you have got a reel-to-reel tape and I used to just dash out and buy them as a needed them where I could find them fairly cheap because we didn't have much money. There was never any reason to stop a reel-to-reel unless I was instructed, and I was always instructed by hand movement rather than by voice, yes.
Q. So you had been talking to Gladys Elphik with the tape going.
A. Yes.
Q. And you continued to talk to Rebecca Wilson while the tape was still running, was that what happened.
A. Yes, yes. Glady said something about 'I'll just go off and find these papers'. She was looking for papers which had statements about the production on Point Pearce, yes.
Q. What did you talk to Rebecca Wilson about during that time while the tape was running.
A. I asked her opinion - Glady had asked me if I could give her any reason why an Aboriginal person could trust a white person, and I'd said, no, I couldn't give her any reason. She went on to say that that's how they'd been brought up, that white people aren't to be trusted because of their experience among them. Koomi was saying that it takes many many years for a white person to understand Aboriginal people, and I understood what she was saying. What she was saying is `You will take many years to understand us`. So I said `Well, I understand what you are saying, thank you very much'.
And she said `No offence meant'. This was a method of - an indirect method - Aboriginal people are very careful not to insult you. They can say a number of things in a number of ways, and if you are smart enough to catch it, then you're smart and they should continue talking to you. If you miss it, tough, next time around you might catch it.

Q. How long were you talking to Rebecca Wilson while Gladys was in the bedroom.
A. I suppose it would have been - I don't know, twelve minutes, 15 minutes maybe.

Q. Gladys came back into the kitchen after that.
A. She came back and there was - she had a lot of papers and she put them on the table and she was sorting through and Rebecca Wilson kept on talking, a few things. She told the story of a being on Point McLeay and she told the story of how Taplin came and how they sat him under a tree which was supposed to be inhabited by this being, which we would call an evil being, I suppose. They didn't want to kill him, but they sat him under the tree and thought `The evil spirit will get rid of him'. He was alive and well the next morning so they thought there must be something about this man, and she said that he had a hard time convincing Aboriginal people, et cetera.

Q. This portion of the evidence has already been in the public arena, has it?
A. It is a well known story.
Q. A well known story.
A. Yes, it is well known amongst -
Q. I only say that, you understand, because of my situation in respect of Section 35.
A. Yes, indeed. Thank you for that. This has been told.

Q. When Gladys came back with her papers from the bedroom,
did you then resume your discussions with her about
Point Pearce.
A. Yes, yes, because Rebecca Wilson wasn't there as my
principal. I had no intention of interviewing her
because she was from another culture, a different
nation. I was concentrating on Nurrunga material, not
on Ngarrindjeri. I knew enough from Gladys not to ask a
lot of things of persons of a different culture. I was
prompted by her to speak more to Koomi later, and she
invited me down to Point McLeay later on.
Q. On this particular day, did you continue to record the
conversation you were having.
A. We came to the end of the tape and I said `Well that's
it, I haven't got another tape with me, Gladys'. And
she said `Well, let's go into the lounge. I want you to
talk to Koomi'. So we moved from the kitchen to the
lounge. The lounge was small. There was a lounge seat
along the wall there, and a picture on the wall, the
television set was there, and there was another chair.
I think I sat in this chair here, if I remember rightly
(INDICATES), on the right-hand side of the lounge, and
so she said `Go on, Koomi, you tell, Betty'. So Koomi
then related to me she was upset that something had been
ploughed up or bulldozed up or something and she was
upset, and Gladys then said in her forthright way
`They're digging up our culture'. Then Rebecca Wilson
proceeded to tell me some things that alluded to, in
general terms, the secret and sacred nature of many
places around that Ngarrindjeri area, north, south, east
and west, which she indicated, in specific terms, that
she couldn't talk about. She made it very very clear
that she wouldn't talk about it. So Gladys encouraged
her to talk and she said `You have to tell things so
that these kids will know'. Koomi was upset when she
started talking about it and related that - I can say,
in general terms - the Hindmarsh Island and the islands
and the waters surrounding those areas are extremely
important - extremely secret and, above all, sacred to Aboriginal people, and especially to women.

Q. I think when you were having this conversation with Koomi, you didn't have the tape recorder on, is that right.

A. Oh no. There was no tape recorder in the lounge when we were talking. The tape had finished. I had the tape recorder turned off. It was in the kitchen on the table and if you saw it, it is quite a big one, you would understand that I wouldn't willingly lump it around. But the thing is that Koomi said 'There's no way. I can't talk' and I said 'Well, can I make a note? Can I make a note?' I had a little notebook and I'd already written some pages, two or three pages. It was just a little school notebook, a little memo book, and I'd already written some pages in that that was Nurrunga business from Glady, because we'd been somewhere. I'd been taking notes of something she said and I had that book in my bag and I said 'Can I write in this?' And after a while she was persuaded to let me make notes, which I did.

Q. About how many notes did you make of that conversation, can you remember.

A. Probably about all the book. The rest of the book. It was just a small memo type book.

Q. Do you have the tape recording of Koomi's voice and the notes that you made of that conversation now.

A. I haven't got them in my possession, no.

Q. Have you given them to somebody else.

A. You see, when - see, I was never going to bring this out because I had promised Gladys. I promised Koomi I'd never speak about her words. I promised Glady that I would never speak her words until the book was published and I -

COMSR

Q. Which book are we talking about.

A. I was to publish a book on the life of Gladys Elphik and the Nurrunga people, and I promised I'd never do that.
In fact, I put all the tapes in the library in 1990, in about May 1990, and they have been there until the day when Sarah Milera's photograph appeared in the local press.

Q: I think the question was, where are the tapes and the book now.

A: I rang the Nurrunga people, who are responsible for the tapes and everything, and I got their permission to speak to Doreen Kartinyeri. I rushed down and I got the notebook and the tape I had from my donor's copy from the Mortlock Library, and I delivered them - my husband drove me to town, I don't drive a car, and I delivered them to the building where the Aboriginal Legal Rights are and left them there for Doreen Kartinyeri.
XN

Q. As far as you know, is that where they now are.
A. As far as I know. The rest of them are all in my
  safekeeping. Madam Commissioner, you must understand.
  I feel a huge personal responsibility for what I had
  recorded. I feel extremely guilty that that book has
  never been issued. My own life has been - had its
  difficulties and has prevented me publishing this work.
  I never dreamed that mine was the only recording of
  this. I never even imagined that the unbelievable
  situation would arise where I was - I hope I am not the
  only one to have recorded these women. I hope someone
  will come forward who is in my own position and will
  have similar recordings. I just never dreamed, in all
  my life, that this would be - this would occur, because
  I have kept quiet and silence and I have kept my promise
  to Gladys and Koomi and to others who were on the tapes,
  including her son; whose name I won't say.

Q. Have you come to the part of your story now which is
  about to concern the matters which Koomi told you
  relating to the Ngarrindjeri area.
A. I can only just emphasise in general terms for the open
  court that, in fact -

COMSR

Q. Are we going to go into something that -
A. I was just going to reiterate that she spoke about the
  sacred and secret nature about the islands and the water
  and I can't particularise that before anyone other than
  women.
Q. I appreciate that, but you are being asked, have we
  reached that stage of your evidence -
A. I think so, yes.
Q. That you are asking that the hearing be closed.
A. I am very aware I am very amateur at the question of all
  this.
Q. Just so that I understand; you now say that, due to the
  nature of the evidence that you are going to traverse
  that it should be taken at a private hearing of the -
A. I would prefer it, in case -
Q. You say something that -
A. In case I run over into areas that - I have a very
   strong understanding, Madam Commissioner, that 200 -
Q. I don't think you will have - I think I can say that, if
   there is any potential for -
A. Yes.
Q. For this matter to be one that takes me outside of the
terms of my authority I would propose to close the
hearing to all excepting those persons whom I permit to
remain. And, at the very least, that means that only
counsel and parties and the members of the Commission
staff who are necessarily present will remain and then I
will hear if there is any problem in respect to that.
COMSR: This session of the -
MR MEYER: Before that order is made; we have been
handed a copy of a statement. I just want to be sure
where we stand in relation to it.
I assume that what I have been handed is MFI 6?
COMSR: Perhaps we could clarify that matter
now?
MS SIMPSON: Yes, that's correct.
COMSR: Is it a statement that has to be put to
the witness?
MS SIMPSON: It is a statement that Mrs Fisher gave
and it is - it does contain material, all of which
should be suppressed from publication, in any event.
MR MEYER: That fixes that problem.
COMSR: It is not an exhibit, at this stage, in
any case.
This hearing will now be closed and into a private
hearing.
HEARING CLOSED