

1 COMSR STEVENS

2

3 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

4

5 WEDNESDAY, 30 AUGUST 1995

6

7 RESUMING 10.10 A.M.

8 MS LAYTON: In the absence of anyone standing up, I
9 thought I might use this opportunity. If the Commission
10 pleases, I appear with Mr Collett to represent the
11 Aboriginal Legal Rights Movement to make submissions
12 with regard to the judgment given by the Full Court as
13 to the effect of the invalid authorisations of the
14 Minister on these proceedings. You will remember that
15 Mr Collett appeared on Friday last week and sought to
16 make submissions and it was suggested that it be put in
17 writing to counsel assisting. That has, in fact, been
18 done and all counsel, I understand, here have received
19 copies of the same to understand what rulings we, in
20 fact, seek from the Commission.

21 COMSR: I must say at the time that Mr Collett
22 appeared, I was unaware of the circumstances which led
23 to him appearing and I have since seen some
24 correspondence from him to counsel assisting and I now
25 understand how it came about that he appeared before me
26 on that occasion.

27 MS LAYTON: Exactly. It was because of the comments
28 made by Debelle J who suggested, as a consequence of
29 that decision, that the proper course was to go back to
30 the Commissioner and inform yourself of the grounds and
31 also to put matters to you as to how information ought
32 to be dealt with, both that which is past and that which
33 is to come. It is with respect to that we seek to make
34 submissions.

35 COMSR: Perhaps it might assist if I explain
36 what has been done to date in respect of the evidence,
37 because you would not have been present during much of
38 the hearing. As I have indicated during the course of

1 the hearing, that for the purposes of the hearing, I
2 propose to treat as confidential those matters which
3 touched on Aboriginal tradition, notwithstanding the
4 degree of publicity that might already have been given
5 to that information. To that end, of course, when the
6 matters came before me and it was apparent that
7 witnesses were going to give evidence which touched on
8 women's business, I made particular orders.

9 In respect of the evidence of Mrs Fisher, I closed
10 the hearing. We went into private hearing. I directed
11 that all male persons leave the inquiry and that all
12 female persons, except for the witness, female legal
13 advisors and Commission attendants and transcript
14 recorders also leave the hearing and that the evidence
15 be given in private. I made an order that the
16 transcript of the evidence be made available to counsel
17 and legal representatives permitted to remain in the
18 hearing whilst the evidence was being taken in private.
19 I ordered that an audio tape, marked Exhibit 20, was to
20 be suppressed, that no copies of it made and that it be
21 placed in a sealed envelope while the hearing continued.
22 I made an order prohibiting the publication of any
23 evidence or material given during the private session of
24 the Commission and an order restricting the distribution
25 of the transcript of the private hearing from anyone
26 other than the Commissioner, female counsel assisting
27 the Commissioner, female legal representatives present
28 at the hearing. The transcript was realised to those
29 persons for the duration of the hearing and at the
30 conclusion of the hearing I ordered that all copies of
31 the transcript released to representatives were to be
32 returned to the Commission.

33 In respect of Dorothy Wilson, I made an order
34 pursuant to s.6 of the Royal Commissions Act that all
35 persons, other than those permitted by me to be present
36 in attendance, leave the inquiry. That the persons
37 permitted were: female advisors, female legal
38 attendants, the transcript reporters and female

1 attendants of the Commission. I directed that no copy
2 of the transcript as part of the evidence during the
3 private hearing be given to any male person, and no copy
4 was to be given or made available for inspection by
5 other than the female representatives of the persons at
6 the hearing upon their undertaking not to divulge any of
7 the contents. The transcript of evidence of the private
8 session was to be made on pink paper and it was to be
9 made available to female counsel and legal
10 representatives during the course of the hearing; and at
11 the conclusion of the hearing, the transcript so
12 released was to be returned to the Commission.

13 I further ordered that distribution of the complete
14 witness statement of Dorothy Wilson was restricted to
15 the Commissioner, female counsel assisting the
16 Commission and female legal representatives. The
17 statement was released to those persons for the duration
18 of the hearing and all copies were to be handed back to
19 the Commissioner at the conclusion of the hearing. I
20 ordered that no portion of the transcript of evidence of
21 the private hearing and no copy of the witness statement
22 relating to women's business was to be copied or
23 produced in any manner and no person permitted to be
24 present during the private session was to reveal to any
25 male person any details of women's business referred to
26 in the statement of the witness. And I forbade the
27 publication of any portion of the evidence given during
28 the private session or of any portion of the statement
29 of the witness concerning the women's business.

30 Moreover, those persons who are permitted by me to
31 be in attendance during the course of the private
32 hearing were required to sign undertakings as to
33 confidentiality. Of course, in the final analysis,
34 there are the provisions of s.35 of the Aboriginal
35 Heritage Act which, in itself, makes it an offence to
36 divulge information contrary to that section. So, that
37 is the manner in which that information was dealt with.

38 Subsequent to the determination on Friday of last

1 week, all copies of the pink transcript have been
2 returned to the Commission and have been secured and
3 copies of any statements which were only released on the
4 basis of persons, of counsel signing undertakings as to
5 confidentiality, have, I understand, now been returned
6 to the Commission and secured in the same manner.

7 MR SMITH: Yes. Madam Commissioner, I cannot vouch
8 for everyone having done that, but certainly many have
9 and others have been pursued.

10 COMSR: In that case, any person holding any
11 statement, any counsel holding a statement is to return
12 it to the Commission until the outcome of the
13 application by the Commission for a further authority
14 has been determined. Those are - I might say that, of
15 course, much of the information with which we are
16 concerned is information that is already in the public
17 arena. As I indicated for the purposes of this
18 Commission, I have acted on the assumption that,
19 notwithstanding the degree of publicity which may have
20 attended any such information, that where it was to be
21 part of the evidence of a witness and it should be heard
22 in private and touched on women's business at a hearing
23 at which all male persons were excluded, that, I think,
24 covers most of it. I'm not sure if there other aspects?

25 MR MEYER: I make one addition to that. In
26 listening to the orders that your Honour's dictated, my
27 recollection was that there was a further additional
28 order of the persons allowed to be present and that was
29 Dr Deane Fergie to be represented and Mrs Chapman; i.e.,
30 two female parties involved in these proceedings which
31 you haven't referred to. That is a misconception.

32 COMSR: That is correct, but I was talking about
33 the distribution of the material.

34 MR MEYER: Both of those people also gave
35 undertakings in relation to the material.

36 MS LAYTON: I'm grateful for the Commission having
37 informed me of that and certainly care was taken to make
38 sure that, so far as there were valid authorisations,

- 1 they were respected in an appropriate way.
2 The submissions that I wish to make this morning
3 goes beyond those matters that have already been
4 indicated as having been done already in the light of
5 the Supreme Court judgment. I wish to refer to the
6 matters in my letter - and I would be grateful if Mr
7 Abbott could wait for a moment.
- 8 MR ABBOTT: I object, because, in our submission -
9 MS LAYTON: Mr Abbott does not own this Commission.
10 I'm on my feet -
- 11 MR ABBOTT: I want to argue the matter of locus
12 standi -
- 13 MS LAYTON: Well, I'm standing.
- 14 MR ABBOTT: In my submission, my learned friend has
15 no such locus standi.
- 16 COMSR: Mr Abbott, I understand that. What I
17 understand that -
- 18 MR ABBOTT: She represents a legal organisation -
- 19 MS LAYTON: I would be grateful for Mr Abbott to
20 wait for you to finish what you have to say.
- 21 COMSR: As I understand it, Miss Layton appears
22 before me at the suggestion of one of the judges of the
23 Full Court who dealt with the matter. Whether it was
24 suggested it be by way of formal application before me
25 or simply an informal approach to me, I'm not quite sure
26 of that, but, in any event -
- 27 MR ABBOTT: They have informed you by letter -
- 28 MS LAYTON: Mr Abbott is still continuing,
29 notwithstanding -
- 30 MR ABBOTT: And also -
- 31 COMSR: Mr Abbott, I don't know - are you taking
32 a preliminary objection to the hearing this?
- 33 MR ABBOTT: It is a preliminary objection to hearing
34 from my learned friend who is retained by Johnson
35 Withers -
- 36 MS LAYTON: Do we have to hear a litany?
- 37 MR ABBOTT: Who is retained by Johnson Withers to
38 represent the Aboriginal Legal Rights Movement, an

1 organisation which, by its charter, is a -

2 COMMISSION DISRUPTED BY PUBLIC GALARY

3 COMSR: I propose to adjourn the Commission.

4 ADJOURNED 10.22 A.M.

5 RESUMING 10.27 A.M.

6 COMSR: I take it that that was not organised in
7 any way by you?

8 MR ABBOTT: Certainly not by me and none of my
9 clients. I have no control over the mass choir. I
10 would like to continue with my submission.

11 COMSR: As I understand it, all that Miss Layton
12 is doing is taking advantage of a suggestion that was
13 made in the Full Court, that pending the question of an
14 application for an authorisation being considered by the
15 Minister, she makes some submissions to me as to the
16 security of documents. Now, I propose to -

17 MR ABBOTT: I would like to make my point in one
18 minute. Having made it -

19 MS LAYTON: About what? I would like to know what
20 Mr Abbott is going to make submissions about?

21 MR ABBOTT: My point concerns her right to be heard
22 on the basis that the Australian Legal - the Aboriginal
23 Legal Rights Movement, by its charter, is meant to
24 represent all Aboriginal people. At present, it is not
25 representing all Aboriginal people. It is not
26 representing those for whom I act, namely 14 Aboriginal
27 women and many others, and it has taken a partisan role.

28 MS LAYTON: I object.

29 MR ABBOTT: And should not be heard.

30 MS LAYTON: I'm tired of reading transcript of
31 interjections of Mr Abbott which are quite inappropriate
32 and land on the transcript permanently and I ask that
33 that be struck out.

34 COMSR: I think that that should be struck
35 out. Last time Miss Layton appeared before me, she made
36 it clear, because of the conflict of interest that was
37 involved in the position she had, she felt that she
38 couldn't continue. I don't see Miss Layton appearing

1 before me requesting permission to appear as a party.
2 She is appearing before me simply to put some
3 suggestions, if you like - put it that way - that arise
4 out of appearing in the Supreme Court as to securing
5 documents. Now, that applies equally to all parties.

6 MR ABBOTT: That is not borne out by the six page
7 letter which appears to ask for a lot more. In essence,
8 her submission is to close it down.

9 MS LAYTON: I don't want my friend to summarize the
10 submission and if he would stick to the point.

11 MR ABBOTT: The point of it is that I act for a
12 number of Aboriginal women, Ngarrindjeri women, who wish
13 this Commission to proceed. My friend's point of view,
14 as is detected in the letter, is that this Commission
15 should not proceed.

16 MS LAYTON: I object to my friend saying that, and
17 that should be struck out so far as that is on the
18 transcript.

19 MR ABBOTT: That is what the letter says.

20 COMSR: This is simply a matter - if you put it,
21 if I can put it this way, of housekeeping in a way.

22 MR ABBOTT: I've made my submission. I made it
23 before and I will continue to make it every time the
24 Aboriginal Legal Rights Movement seeks to address you.

25 COMSR: I understand that Miss Layton is not
26 appearing before me as a party, but consequent upon the
27 ruling of the Supreme Court and the suggestion that was
28 made there that she or that the Aboriginal Legal Rights
29 Movement approach this Commission with suggestions as to
30 securing the confidentiality of information which is
31 already before me. Now I don't see that as an
32 application by Miss Layton to become a party to these
33 proceedings. Indeed, had I not been aware that those
34 were the circumstances as I have indicated, I wouldn't
35 have thought it appropriate to have heard Mr Collett on
36 it. Since then, my attention has been drawn to it and,
37 so as far as I'm concerned, this is a preliminary issue
38 as to what might be required of the Commission by way of

1 securing the security of documents. I propose - I mean,
2 I made it clear what the Commission itself has done.
3 Now, if there is anything further that Miss Layton
4 wishes to put on that matter, as I say, I would be
5 prepared to hear it in the circumstances.

6 MS LAYTON: Thank you. The matters that I wish to
7 put to the Commission are set out in the letter. If I
8 could perhaps summarize some of the matters.

9 COMSR: I read the letter. I don't think it is
10 necessary to go through it.

11 MS LAYTON: I wasn't going to go through it. There
12 are matters I wish to highlight. They go beyond the
13 assurances that the Commission has already given as to
14 the way in which evidence has been dealt with. There
15 are certain matters that still remain outstanding, which
16 is why we seek rules in numbers 1, 2 and 3 set out on
17 pp.1 and 2 of our letter.

18 If I go to the second and third of those rulings
19 first. Those rulings seek from you that any information
20 which the Royal Commissioner or counsel assisting has in
21 relation to any Aboriginal site, objects, remains or
22 tradition which has been divulged in the Hindmarsh
23 Bridge Royal Commission either in contravention of s.35
24 or pursuant to authorisations purported to be given by
25 the Minister and then named, be maintained securely and
26 not be disseminated to any person pending any further
27 valid authorisations in respect of that material.

28 COMSR: I thought I dealt with this?

29 MS LAYTON: If I could deal with that. One of the
30 concerns that we have is that whilst care has certainly
31 been taken in relation to the public and in respect of
32 witnesses and counsel on a limited basis, the fact is
33 that any information that has been obtained by the
34 Commission or counsel assisting which offended s.35, is,
35 in fact, unlawful information and cannot be used at all
36 at this present time.

1 In other words, it cannot be sifted through. It cannot
2 be sorted out as that which is s.35 and that which is
3 not, because that was only something that could have
4 been done by way of the authorisation. It was the
5 authorisation that gave you and counsel assisting the
6 ability to say 'Look, we think this is s.35, we think
7 this is not.' And that is how the sifting out was
8 appropriately done pursuant to authorisations given,
9 but, as soon as there is no authorisation, there is no
10 way in which I think you, as a Commissioner, or, indeed,
11 counsel assisting the Commission, can go through that
12 evidence again. It cannot thereby have a legality by
13 virtue of the fact that it has been given unlawfully.
14 It is still unlawful material that cannot be used in any
15 way or looked through in any way, otherwise there is a
16 contravention of s.35 and that is the important point
17 that we wish to make. And I think that it has not been
18 understood as to the effect of the unlawfulness of the
19 authorisations in the fact that evidence, once given
20 unlawfully, remains tainted that way until such time as
21 there is if there is any authorisation to allow that
22 information to be divulged in accordance with s.35.

23 COMSR: Ms Layton, at present I am dealing with
24 the question of the securing of information which has
25 already been given.

26 MS LAYTON: The understand that.

27 COMSR: The question of the legality and the use
28 to which the information may be put by the Commission
29 is, I would suggest, a different matter, because I have
30 already made it clear that, pending a resolution by the
31 Minister as to an authorisation, that I have given a
32 practice direction that there be no questions asked or
33 information elicited concerning matters in contravention
34 of s.35.

35 MS LAYTON: Yes, that is certainly part of it, but
36 the other part that we wish to put to you and urge upon
37 you very strongly is that none of that information can
38 be dealt with. And if as I understand you,

1 Commissioner, you are at present, it would seem, having
2 a different view of that - namely, that once it is in
3 your possession, namely, the transcript much of which
4 would offend s.35 - that that still gives you an ability
5 to be able to read that and refer to it and likewise
6 counsel to read and refer to it. Perhaps refer to other
7 statements that have been taken which would otherwise
8 offend s.35 and be legally able to do it.

9 MS NELSON: I am sorry, I am really intruding, I
10 know, on what Ms Layton is putting, but, of course, she
11 wasn't here last week and we did, in fact, deal with
12 that topic and we all acknowledge that we can't
13 extrapolate from the evidence already given that which
14 was lawfully received and that which was subject to an
15 unlawful authorisation and you acknowledged that. So
16 that there is, in fact, an accepted view as I understand
17 it in the Commission that the evidence already received
18 can't be unscrambled, so to speak. And so the status of
19 that evidence will have to remain to be decided when and
20 if the Minister takes some action. And I just thought
21 perhaps because Ms Layton wasn't here that she wasn't
22 perhaps aware of that.

23 COMSR: Yes, you see -

24 MS LAYTON: No, I am aware of that and I am
25 grateful, but I am taking the point beyond that.

26 COMSR: Yes, I understand that, but I had hoped
27 that I had made it clear that, pending the question of
28 an authorisation, the only evidence which the Commission
29 would be hearing would be that which doesn't impinge
30 upon the question of s.35.

31 MS LAYTON: If I could go to that a little later in
32 this submission and it won't be much later, but I just
33 want to make the same point. Namely, that which Ms
34 Nelson has referred to I understand to have been the
35 situation, but that still does not permit either counsel
36 or witnesses to go through information that is otherwise
37 unlawfully divulged, merely because they got it - as
38 they saw it - appropriately at the time pursuant to an

1 authorisation. As soon as that authorisation is no
2 longer there because it is invalid, that material is
3 itself illegal and invalidly obtained.

4 COMSR: Only that which offends s.35, of course.

5 MS LAYTON: Yes, only that which offends s.35, but
6 that then comes to another issue.

7 COMSR: Of course, the question of whether there
8 is any such evidence and the extent of it - it is not
9 something I propose to go into at the present time - but
10 it would clearly be within a very limited range, if at
11 all. But, notwithstanding that, what we have said is
12 that we don't propose to pursue any further or call any
13 further witnesses where there is the possibility that
14 there will be an infringement of s.35. That, of course,
15 doesn't mean, as I understand it, that evidence which is
16 already in the public arena and does not in any way
17 offend against s.35 couldn't be dealt with. What you
18 are saying is that we shouldn't refer back to the
19 transcript of what has been said.

20 MS LAYTON: No, I am saying one can't. That is the
21 point that I am making. And, to the extent that the
22 Commission may have any different view from the one that
23 I am putting, namely, that that material is tainted, it
24 cannot even be referred to. It cannot be looked at. It
25 cannot be dealt with in any way.

26 COMSR: Without agreeing with your proposition
27 in any way, Ms Layton, without taking a view, one way or
28 the other, I am simply indicating that the Commission
29 has decided that, pending the resolution of the question
30 of the authorisation, that it does not propose to have
31 recourse to that evidence that has been given in the
32 past.

33 MS LAYTON: Yes, I understand that. And perhaps I
34 can move on from there. I think I have made the point
35 clear.

36 COMSR: Yes, you have made the point.

37 MS LAYTON: Which is counsel even obtaining
38 instructions from their witnesses may not refer to that

1 material which has been obtained unlawfully.

2 If I could now move on to no.3 of the rulings
3 sought. That relates to witnesses, counsel and parties.
4 Namely, that they too will maintain securely and not
5 disseminate to any person any of the material that would
6 be covered by s.35.

7 COMSR: Of course, s.35 makes it an offence to
8 do so. They have given written undertakings. The
9 evidence, as I have said, has been restricted in its
10 distribution to female legal representatives and
11 counsel.

12 MS LAYTON: But that doesn't necessarily mean that
13 it doesn't offend s.35. That is the point that I am
14 making as well. That the whole question now of what
15 does or does not offend s.35 in the light of the
16 authorisations having been invalid must rest solely with
17 either the Minister or his delegate. And the Minister
18 or his delegate may take a very different view from that
19 which the Royal Commission or counsel assisting took
20 with regard to certain evidence. And it is for them
21 only to decide whether or not there should be an
22 authorisation. And, if so, what is the nature of the
23 authorisation and what should be the subject of an
24 authorisation. And that may not be the same as the
25 categorisation that the Commission or counsel assisting
26 may have had pursuant to the invalid authorisations.

27 COMSR: That may well be the case, Ms Layton,
28 but, as I have said, the situation is that I have
29 already made a determination that appears to me to cover
30 the situation pending any authorisation which may or may
31 not be given. And it is unnecessary, in those
32 circumstances, for me to consider the legal argument
33 that you are putting to me, because I think it had
34 already been agreed in the Commission, as soon as the
35 results or the judgment was handed down concerning the
36 s.35 declarations, what would be the most prudent course
37 to adopt in respect of that and it appears to coincide
38 with what you are seeking.

1 MS LAYTON: No, we go further. As I understand it,
2 what has been returned quite appropriately is
3 transcript. What has also been returned quite
4 appropriately is statements. But there were exhibits
5 before the Royal Commission which include
6 anthropological reports, including Dr Fergie's report,
7 Dr Lucas's report, Dr Edmonds' report. They must also
8 be in the hands of people and they would also be
9 illegally in the hands of those people and against the
10 dissemination rule of the s.35 authorisations.

11 MS SIMPSON: I think you dealt with that earlier in
12 your rulings and that is that there either has been or
13 there will be a direction that those exhibits that were
14 suppressed from publication all be returned by the end
15 of today.

16 MS LAYTON: That would certainly overcome the
17 problem that I have with exhibits. If they are returned
18 to the Commission, that -

19 COMSR: They are not only to be returned, but I
20 must say that considerable thought was given to the
21 question of securing the confidentiality of documents
22 within the Commission and, indeed, there is a security
23 system in operation and there is a - without going into
24 the details -

25 MS LAYTON: No, I needn't know the details and I am
26 grateful for my friend indicating that those exhibits,
27 which would otherwise be covered by s.35, are also to be
28 returned.

29 If I could then come to -

30 MR MEYER: Just so we don't have any
31 misunderstandings: I understand Mr Collett has already
32 said that the Fergie report is a public document and I
33 understand it to be a public document. Mr Tickner has
34 made it publicly available.

35 MS LAYTON: If I could say two things, speaking for
36 my learned junior, again?

37 The Fergie report was a restricted report. It is
38 true that it was handed out to certain people at certain

- 1 times, but the mere fact that it has been handed out
2 does not make it that it is no longer covered by s.35.
3 There seems to be a belief that, because something is in
4 the public arena, whatever that might mean, that it
5 thereby doesn't offend s.35 any longer.
- 6 COMSR: That has already been divulged.
- 7 MS LAYTON: It doesn't matter. S.35 is, in fact, a
8 section very broad in its scope which says that there
9 shall be no divulgence of material of Aboriginal
10 tradition -
- 11 COMSR: Contrary to -
- 12 MS LAYTON: Contrary to Aboriginal tradition. The
13 mere fact that something may well have been divulged
14 contrary to that doesn't mean that one can compound the
15 problem by continuing to divulge it. And certainly with
16 regard to Dr Fergie's report we would submit very
17 strongly that that is subject to s.35.
- 18 COMSR: Ms Layton, for the purposes of what is
19 to happen to documents meanwhile I have not even
20 examined the question of what is contrary to Aboriginal
21 tradition. I have just adopted the view that, if it has
22 anything to do with Aboriginal tradition, for the
23 purposes meanwhile of the hearing, I will regard it as
24 material of which the confidentiality of it should be
25 protected. There may well be an argument as to the mere
26 assertion that something is contrary to Aboriginal
27 tradition, of course, from any member of the bar doesn't
28 make it so necessarily.
- 29 MS LAYTON: And the other way round.
- 30 COMSR: And the other way round, of course. So,
31 it is for that reason that the Commission has taken the
32 view that it should regain possession of the documents.
- 33 MS LAYTON: And quite appropriately so.
34 Just to make it also clear to my friend, Mr Meyer:
35 Mr Collett has not ever said that it is a public
36 document, as I understand the situation, but I think I
37 have covered the question of the Fergie report, in any
38 event.

- 1 COMSR: Yes, I think I would like to make it
2 clear that, notwithstanding that virtually all of the
3 material that has been given in private session has
4 clearly been explored or aired in the press or on
5 television or in some form of publication, for the
6 purposes of dealing with it meanwhile and for the
7 purposes of receiving it in evidence, I have taken the
8 view, as I have said, out of an excess of caution, that
9 I would treat it as being material which should be heard
10 in private hearing. And I would propose to continue
11 that course. It may well be that virtually all of that
12 material could be released, but I haven't chosen to take
13 that course, Ms Layton.
- 14 MS LAYTON: I don't wish to make any submission on
15 the contents of that. I want to move to the principles
16 before anything else.
- 17 MR MEYER: So there is no misunderstanding: Exhibit
18 3 is the thesis of Dr Clarke. I don't understand that
19 to be suppressed.
- 20 COMSR: There is some material in that on which
21 Dr Clarke has given his evidence.
- 22 MR MEYER: There is witness statements and his
23 thesis and his evidence.
- 24 MR ABBOTT: May I remind you that, at p.235, Dr
25 Clarke was asked about s.35 and he was specifically
26 asked whether or not his report, his statement of
27 evidence, or, indeed, his evidence has the potential or
28 contravenes the provisions of s.35 and he said no, it
29 didn't. There is nothing in it that would contravene
30 s.35. We have had evidence from Dr Clarke.
- 31 MS LAYTON: I ask to continue on. My friend can
32 have his turn later.
- 33 MR ABBOTT: I will make my submissions at the
34 conclusion.
- 35 COMSR: Yes, make your submissions later. But,
36 in any event, it seems, Ms Layton, that, as I say, we
37 have met your concerns without even examining the
38 content of what has been given in private hearing and

1 what I have undertaken should be kept confidential
2 pending the authorisation, if it ever comes through, in
3 whatever form it may come.

4 MS LAYTON: Yes, I accept that. I don't wish to
5 repeat what I have said earlier. That is certainly
6 partly so that that resolves some qualms about that.

7 If I could now move on to the first of the rulings
8 that we seek.

9 This was a matter that we, in fact, sought, namely,
10 the adjournment of any further hearing of this Royal
11 Commission, before the Supreme Court as an adjunct to
12 the relief. And that was, in fact, what - partly what
13 led to DeBelle J, in particular, saying:

14 'The proper course is to go to the Commission and put
15 your views.'

16 And this is what we wish to put in respect of that:

17 There are a number of matters that concern us as a
18 result of the authorisations being invalid, and the
19 particular concern is this: that the sole focus of this
20 Royal Commission is on whether or not the women's
21 business, as contained in sealed envelopes, is or is not
22 a fabrication.

23 COMSR: That's right.

24 MS LAYTON: And that has been as a consequence of a
25 ruling that your Honour has given with regard to what
26 the Terms of Reference mean.

27 COMSR: Of course there is a lot of peripheral
28 evidence which doesn't go directly to that which can be
29 called.

30 MS LAYTON: If I could just make very rapidly the
31 points I wish to make?

32 That, of course, is the focus of the Royal
33 Commission. And, as you have also indicated, at p.239,
34 you didn't seek to compel witnesses to disclose the
35 contents of sealed envelopes and that you did not
36 consider it necessary to view those envelopes, but,
37 instead, you would inform yourself as to the women's
38 business as contained in sealed envelopes.

- 1 COMSR: To the extent that it would be possible
2 to do so.
- 3 MS LAYTON: Of course.
- 4 COMSR: And, of course, I might say that one of
5 the witnesses has refused to reveal anything that is
6 secret. So it is not - it is -
- 7 MS LAYTON: But, in any event, you indicated that
8 you would inform yourself by three sources.
9 Anthropological sources, statements made to others and
10 given in evidence and also evidence from Betty Fisher.
11 So, those were three sources that you named as being
12 the source of what was alleged to have been fabricated.
- 13 COMSR: And any other source which might of
14 course evolve during the course of the evidence.
- 15 MS LAYTON: They were three obvious ones that were
16 named, if I may so say, and which there has been
17 evidence adduced from those sources. The point of that
18 is that that information is the information that is
19 covered by s.35.
- 20 MR ABBOTT: How can that be so? Aboriginal Legal
21 Rights Movement -
- 22 COMSR: Just a moment, Mr Abbott.
- 23 MS LAYTON: I hope the arrant nonsense is not going
24 down on transcript and I ask again that those comments
25 be expunged.
26 If I could continue just on that point?
- 27 COMSR: What is the point?
- 28 MS LAYTON: The point that we are making is that the
29 very core of this Royal Commission is the question of -
30 CONTINUED

1 COMSR: Undoubtedly it is the core.

2 MS LAYTON: And the core of that evidence at the
3 moment, insofar as it has been given, has been given in
4 which would otherwise be information pursuant to Section
5 35, is in fact unlawfully in front of the commission,
6 namely, the anthropological evidence with regard to Dr
7 Fergie's report, we would say, infringes Section 35.

8 A lot of the information which was given in private
9 session, that we of course were not privy to, but we
10 would assume it would cover some of this information in
11 the way that you have taken considerable care to make
12 sure that any matters that seem to be related to what
13 might be secret women's business has been dwelt with in
14 private session, and also part of the evidence of Betty
15 Fisher, to the extent that that is all of the evidence
16 so far, we would submit that is in fact unlawful
17 evidence.

18 We submit that until such time as any of that
19 information can be known to be actually divulged
20 lawfully, there is nothing upon which it could be said
21 that the 'it' - namely the women's business that is
22 alleged to be a fabrication - can in fact be before this
23 commission. It cannot be presumed that that may be
24 fixed up by a subsequent authorisation. In other words,
25 how can this Royal Commission continue when the very
26 essence of what is meant to be the women's business
27 which is the subject of the fabrication, is itself at
28 the moment unlawful and cannot be before the Royal
29 Commission?

30 COMSR: This is an inquiry into facts. It may
31 well be that a commission could be set up to inquire
32 into facts and, in the final analysis, very little is
33 achieved, but of course that doesn't prevent the
34 commission going forward with the inquiry.

35 MS LAYTON: The problem with this is that the very
36 substance and the very focus is not presently lawfully
37 before the commission, and it is not known whether it
38 ever will be. How can one assess relevance of evidence?

1 COMSR: That may well be the case.

2 MS LAYTON: This is the very point we make. It is
3 suggested that somehow the commission should roll on
4 with witnesses that do not, it is thought, involve
5 Section 35, and it is submitted that no evidence should
6 be allowed to roll on when one cannot glean whether or
7 not that evidence is in fact relevant to what is women's
8 business which is alleged to be a fabrication, when that
9 in itself may never come before the Royal Commission,
10 and may never be known because the delegate, Mr Baker,
11 has indicated that he is consulting with a view to
12 whether or not there would be an authorisation, and
13 quite appropriately so.

14 In his press release he said on two occasions that
15 what he was doing was consulting before deciding whether
16 he should make an authorisation at all. So there are
17 several scenarios that could occur. One, no
18 authorisation at all, in which case there will not be
19 any evidence about what is contained in secret women's
20 business, because that would automatically fall within
21 Section 35; alternatively, he may give a limited
22 authorisation, in other words, some of it only may be
23 before the commission but others not; or he may give an
24 authorisation in full terms.

25 But at this point of time this Royal Commission has
26 no assurance whatsoever that the very foundation upon
27 which this Royal Commission is geared will ever lawfully
28 come before the Royal Commission. It is on that basis
29 that we say that evidence should not roll on. As I
30 understand it, it is only a suggestion to roll on for
31 time purposes. But in the interests of justice and
32 fairness and lawfulness, we would submit that it should
33 not roll on pending a determination as to whether any of
34 that information which relates to women's business does
35 in fact become lawfully available before the Royal
36 Commission.

37 The second major point we wish to make on this is
38 that we would submit that no evidence can be assessed as

1 either relevant or irrelevant when the very core of it
2 isn't known. And further, all evidence which comes
3 before this commission must be either directly or
4 indirectly related to Section 35.

5 Counsel are now in an invidious position in that
6 they will not be able to obtain instructions as to
7 whether a certain witness should or should not be
8 cross-examined on matters which relate to Section 35.
9 It may be thought by counsel assisting that a witness
10 put forward may be only on a limited area, such as X,
11 but on the other hand, those persons who are parties
12 before this commission and counsel, may wish to expand
13 beyond that which is thought by counsel assisting is the
14 focus of that particular person's evidence.

15 COMSR: That is so, but meanwhile there is a
16 practice direction which would curtail any such -

17 MS LAYTON: Then the problem is: how can a witness
18 come along and give part evidence? How can objections
19 be taken? It may very well be that objections may need
20 to be taken along the way which depend on Section 35,
21 which depend on taking instructions. Or, alternatively,
22 everybody is trying very hard not to offend Section 35
23 and something slips out.

24 So it is our submission that no counsel and no
25 witness should have to be in that invidious position of
26 wondering whether or not they are going to offend
27 Section 35, and all on the basis of a time limit. In
28 other words, it is not suggested as being the fair way
29 to go, if I can put it that way, but rather, we have to
30 use every moment we have got because there is a time
31 limit on this Royal Commission.

32 We would submit very strongly that until such time
33 as the question of the authorisations have in fact been
34 determined, so the commission knows what is evidence and
35 what is not evidence, who it can lawfully have regard
36 to, so that the egg can be unscrambled, as it were, by
37 the Minister and his delegate through lawful
38 authorisations, if they are given, that there shouldn't

1 be any further evidence given on a piecemeal basis with
2 everybody being at risk and not knowing whether or not
3 they may be offending Section 35 or not.

4 It is on that basis that we strongly submit that the
5 Royal Commission should not proceed pending a
6 determination of the authorisations. That completes the
7 submissions we make, if the commission pleases.

8 MS SIMPSON: May I make some submissions in response
9 to what my learned friend has put to you? In
10 particular, I refer you to the judgment of DeBelle J in
11 the action to which my friend referred. There are two
12 passages. In my submission, it is worth referring to in
13 detail. Firstly at p.1 of his judgment relating to the
14 Section 35 authorisation, the last
15 paragraph he said:

16 `It must be emphasized that Section 35 only prohibits
17 the divulging of information in contravention of
18 Aboriginal tradition. Speaking generally, the
19 information which Aboriginal customary law and tradition
20 prescribes should not be publicly disclosed, falls
21 under the heading of sacred or secret business. There
22 is a good deal of Aboriginal customary law and tradition
23 which is not sacred or secret business and which, with
24 the knowledge and consent of Aboriginal people, is in
25 the public domain. There is also a considerable amount
26 of anthropological and other like material which can be
27 examined without, in any respect, contravening
28 Aboriginal law and tradition. In addition, there was a
29 good deal of other information concerning facts
30 pertaining to this inquiry which could have been
31 examined by the Royal Commissioner and counsel
32 assisting her without the necessity for an
33 authorisation under Section 35. I refer, for example,
34 to the evidence of allegations of fabrication and the
35 evidence relating to the circumstances in which some
36 allegations of fabrication were later withdrawn. There
37 was, in short, a good deal of information and other
38 material relevant to the inquiry which could have been

1 examined by the Royal Commissioner and counsel
2 assisting her without the necessity for an
3 authorisation to be made under Section 35. Similarly,
4 a number of witnesses could be spoken to without such
5 an authorisation. The authorisation was required only
6 for that information, material or other evidence which
7 was secret and could not be disclosed without
8 contravening Aboriginal law and tradition'.

9 In my submission, there is a body of evidence and
10 there has been a body of evidence which falls into the
11 category described in detail by DeBelle J. It is quite
12 clear, in my submission, that his judgment envisaged the
13 taking of evidence in the past which did not require
14 Section 35 authorisations, and, by extrapolation, in the
15 future.

16 So while it is true that all counsel and witnesses,
17 for that matter, will need to exercise care that there
18 is no contravention of Section 35 in the course of that
19 inquiry, that is no different, in my submission, to life
20 in general, that is, a statutory provision which
21 provides for an offence, whether there is an inquiry on
22 foot or not. So, in my submission, with care - and
23 there will be care exercised - the commission is not
24 disabled from continuing with the inquiry, and
25 notwithstanding the lack of an authorisation at this
26 point under Section 35.

27 MR ABBOTT: I rise to support that view. It seems
28 to me that Ms Layton's position is fundamentally flawed,
29 in that her starting point is that a mere assertion that
30 material might contravene - or in her case it was an
31 assertion that it did contravene Section 35 - is enough
32 for it to contravene Section 35, and therefore to be
33 treated at all times as though it was material
34 automatically falling within Section 35.

35 The fact of the matter is that Section 35 provides a
36 method by which the material relating to Aboriginal
37 tradition may be divulged, and the only embargo, absent

1 an authority, is material which is in contravention of
2 Aboriginal tradition.

3 It would make a mockery of the section if you
4 accepted her submissions which are effectively to this
5 extent: that you cannot even embark upon an inquiry as
6 to what might or might not be in contravention of
7 Aboriginal tradition, that you have to, as it were,
8 accept assertions from the bar table.

9 To give you a case in point, the Betty Fisher
10 notebook and transcript. You, Commissioner, have at all
11 times heretofore adopted, may I say, a most appropriate
12 but conservative attitude to the reception of the
13 material. Any material which you saw potentially might
14 fall within Section 35, you have, without deciding the
15 issue, treated it, for pro tem, on the basis that there
16 was a Section 35 question mark hanging over it. And,
17 accordingly, it has been dealt with in the way in which
18 you have outlined at the beginning of this morning.

19 In relation to the Betty Fisher material, none of us
20 have heard the audio tape because it was treated as
21 though it fell within Section 35. Betty Fisher gave
22 evidence about, on her view, the secret sacred nature of
23 her notebook and her transcript of notes from it. That
24 material was treated as though it was potentially within
25 Section 35.

26 We have, on the other hand, my learned friend's
27 clients divulging that material via the 7.30 Report to
28 the people in South Australia. I say it ill behoves her
29 to come along representing ALRM, when ALRM are faxing
30 this same material to the media and are, in essence, on
31 her argument, committing a breach of Section 35. On her
32 argument, they must be committing a breach of section
33 35. She cannot come to this commission room and urge
34 you to adopt all these precautions and have one rule for
35 this commission and another rule for ALRM, because that
36 is in effect what has been happening so far.

37 COMSR: Either that or the material was of a
38 sort which did not breach Section 35. In other words,

1 its lack of confidentiality was not an issue.

2 MR ABBOTT: That cannot be so because she is urging
3 upon you in her written letter and today that all the
4 Betty Fisher material should be dealt with as though it
5 comes within Section 35. If she was saying today that
6 all ALRM have revealed in the 12 page or longer fax to
7 the 7.30 Report, and which we have seen the 7.30 Report
8 disseminate to the millions of people in South
9 Australia, could never, on any version, be in breach of
10 Section 35, so be it. If Betty Fisher's evidence is to
11 be divided into parts, so be it.

12 But her letter and her submissions invite you to
13 adopt, and I am using this by way of but one example, an
14 approach to Betty Fisher's material - I will call it
15 that - as though it was all within Section 35 and would
16 need an authority from the Minister before you could
17 embark on it. So I repeat, it ill behoves her to make
18 these submissions in view of her client's behaviour.

19 One of the other submissions which she has made is
20 that we cannot have regard to the evidence. It is true
21 that some parts of the evidence cannot be unscrambled in
22 the sense that it contains a mixture of material
23 potentially within Section 35 and material which is not
24 potentially within Section 35. I acknowledge that
25 represents difficulty, and you, commissioner, have
26 proposed a course which we support.

27 However, I remind you, as I was trying to do in the
28 course of my learned friend's submissions, that Dr
29 Clarke, for example, has already given evidence that
30 certain material produced during the course of his
31 evidence is, in his opinion, not in breach of Section
32 35. I acknowledge that that does not constitute the
33 be-all and end-all of the matter, and that for an
34 anthropologist merely to say, on his oath, that this is
35 his opinion, does not necessarily dispose of the matter
36 once and for all.

37 However, Dr Clarke has said in the witness box, on
38 his oath, that this is so, and there has yet been no-one

1 to step into the witness box, or prepared to step into
2 the witness box, and say to the contrary.

3 MR TILMOUTH: We were refused permission to
4 cross-examine on that, with respect.

5 MR ABBOTT: It would seem to me that you need to be
6 guided, firstly, by evidence as to whether or not
7 material is or is not within the ken of Section 35; and
8 secondly, you need to be guided by assurances from your
9 counsel assisting.

10 It would seem to me to be consonant with good
11 practice that, if either counsel assisting indicate to
12 you that, having examined the material that is intended
13 to be presented before you, in their opinion it does not
14 touch upon section 35, you could proceed with a
15 considerable degree of confidence that it did not.

16 For my learned friend to suggest that this Section
17 35 issue is such a hot potato that none of us can touch
18 it, moreover none of us can examine it, since to examine
19 whether or not the issue can or cannot be resolved
20 somehow itself constitutes an offence against Section
21 35, is a circular argument which, in my submission, you
22 should reject.

23 As you know, I act for a number of Ngarrindjeri
24 women, all of whom are anxious that this commission
25 proceed. They came here and they gave their evidence in
26 the expectation of a speedy resolution of this matter,
27 and they still hope that such a resolution will occur.
28 In my submission, they are entitled to expect from this
29 commission that it will proceed, that it will not be
30 shutdown by assertions from the bar table.

31 May I suggest, commissioner, a course of action
32 which might assist in the future resolution of these
33 matters. On the basis that we proceed today with
34 material which you have been assured by counsel
35 assisting is unlikely to raise Section 35 issues, that
36 we should proceed until such time as someone raises a
37 Section 35 issue. If that someone is a person such as
38 my learned friend, Ms Layton, or persons acting on

1 behalf of other interests, and an assertion is made that
2 it does potentially offend Section 35, then I see no
3 objection and, indeed, good reason why you should
4 thereafter call upon that person to justify their
5 position.

6 So far you have not called upon them to do so. You
7 have not called upon them to justify their position
8 because there has been an authorisation in place. For
9 example, Ms Pyke has said 'Commissioner, I think this
10 raises a Section 35 matter' and you have said 'If that's
11 what you assert, then I am prepared to proceed on that
12 basis'. I have no quibble with you having done that in
13 the past.

14 Now we have no authorisation. I would not want the
15 fact of no authorisation being used as an attempt to
16 derail this commission, and therefore frustrate the
17 legitimate expectations of my clients, merely because
18 counsel, or anyone else for that matter, makes a bold
19 assertion that somehow Section 35 issues are raised.

20 It would seem to me that if such assertion is made,
21 that those who make it should come with evidence. That
22 you should stop the evidence that is being given, and
23 those who want to assert that a Section 35 issue is
24 raised, can get into the witness box and give you some
25 evidence in relation to it.

26 We submit that unless the matter is so transparently
27 obvious, or indeed is supported by counsel assisting,
28 who have further and detailed knowledge, you should not
29 hereafter accept the bold assertions of counsel that
30 somehow a particular question or line of examination may
31 offend Section 35 without hearing some evidence in
32 relation to it.

33 CONTINUED

1 COMSR: You don't think it should be the other
2 way around, that somebody who proposes to call evidence
3 which, in theory, touches on an Aboriginal tradition,
4 might not have to justify doing so on the basis that,
5 for instance, it has already been so much in the public
6 arena that it cannot be described as a divulgence after?

7 MR ABBOTT: Exactly. I was making my comments to
8 refer to, first of all, the material, the type that
9 counsel assisting was of the view does offend s.35 and,
10 secondly, material that has already been divulged in the
11 public arena. I was not intending my comments to cover
12 the witnesses we would recall, one of my clients, who
13 although they say this is not material which we divulge
14 which may be in breach of Aboriginal tradition, there
15 is, therefore, an issue - this is new material or
16 something that is said in secret and not in the media,
17 but material which is in the public domain which has
18 already been divulged. If someone says `Well, that's a
19 s.35 material', then, in my submission, they need to
20 produce evidence as to why they make that claim, who
21 makes it, on what basis. Further, if it has already
22 been divulged, on what basis was it allowed to be
23 divulged to the media. It's ridiculous to say that
24 something all of South Australia could hear on the 7.30
25 Report can't be repeated in the four walls of this
26 Commission. That is, in my submission, a totally
27 ridiculous proposition. Yet the proposition which is
28 urged against it is that one offence, if it occurred,
29 doesn't justify a further offence occurring within the
30 walls of this Commission.

31 I accept that you should not - and, indeed, I know
32 that you will not - commit any breaches, even assuming
33 that you were able to do so, which, in my opinion you
34 are not as an officer, as part of the emanation of the
35 Crown able to do so. Even were that to be the case, it
36 would seem to me that those who want to, as it were,
37 shut this Commission down by saying `You can't hear
38 evidence which is in the public and proper domain' but

1 which has been put in newspapers and given to television
2 interviews, should come along to give evidence as to why
3 you shouldn't.

4 As to the orders that are sought, the rulings
5 sought, we have no problem with information that has
6 been divulged which is truly in contravention of
7 Aboriginal tradition in breach of s.35, or which is made
8 and on which you have collected pursuant to
9 authorisations to be maintained securely and not be
10 disseminated by you. We have no problem with you
11 seeking further undertakings and, if they are required,
12 we will give them.

13 COMSR: The Act itself comes into operation.

14 MR ABBOTT: Exactly, the Act itself has sufficient
15 penalty. The suggestion in the letter in para.4 on p.4,
16 because the authorisations have been made unlawfully -
17 and I remind you that is the writer's bald assertion,
18 that is not a fact. The writer says nobody other than
19 the Minister or his authorised delegate can make any
20 determination as to the status of information in the
21 possession of the Royal Commission. That has to be
22 nonsense, otherwise it ousts the jurisdiction of the
23 court, which there clearly is jurisdiction. S.35 itself
24 is a criminal section. It places criminal sanctions and
25 a criminal penalties with a maximum fine of \$10,000 or
26 imprisonment for six months. Obviously to suggest that
27 only the Minister could determine what is or is not
28 within s.35 is based on a misreading of the section.
29 It's for the court to determine which is or is not in
30 breach of s.35.

31 In any event, in our submission, it is appropriate
32 for you to determine, at least at face value, what is or
33 is not based on, as I have said, assurances from counsel
34 assisting. In the face of those who continue to assert
35 that certain material is within s.35, that it be sworn
36 evidence rather than mere assertions from the bar table.

37 COMSR: Of course, as I understand Miss Layton,
38 she said that I mustn't have regard to the material that

1 is there. But, of course, a lot of that is known to me
2 and doesn't require that I have access to the material.
3 I mean - but, in any event, as I've indicated, as far as
4 that material is concerned, whether there is an argument
5 one way or the other, I don't really think it is for me
6 to become involved in because of the attitude I propose
7 to take.

8 MR ABBOTT: Exactly. We support those procedures
9 and we ask that you continue to take evidence today.

10 MS NELSON: Mam, as you know, I have a limited
11 interest in these proceedings because my client's focus
12 is restricted to his own interests. I would like to
13 think that that allows me to have a degree of
14 objectivity. To that extent, it seems to me that the
15 steps which the Commission has taken to secure material
16 to date and to ensure security of exhibits, and so
17 forth, are sufficient. In practical terms, you can't do
18 more. The question of what the status of that evidence
19 already received may be, will probably have to wait for
20 another day. So that my submissions really are confined
21 to where the Commission goes from here.

22 I think that Mr Abbott's submissions raise an
23 impractical procedure. He says, for example, that
24 because Dr Clarke had said it doesn't offend against
25 s.35, that you should accord his statement some weight -
26 and, of course, so you should, but I do assure you that
27 although he has made that statement, on my instructions,
28 there is a large body of anthropological evidence which
29 has a view to the contrary. I don't think that it's
30 helpful to this Commission to be entering into that
31 debate now.

32 If subsequently there is a valid authorisation that
33 material can be heard, it means that you don't have to
34 listen to that debate or perhaps you will have to rule
35 on whether it's heard in private session or not, but
36 that hasn't occupied a lot of time.

37 I think Mr Abbott has suggested that it is going to
38 inhibit this Commission because you will inevitably be

1 drawn into lengthy arguments as to whether it's an
2 offence against s.35 or whether it doesn't. I don't
3 believe that that will assist the Commission in
4 completing this process. I'm well aware that there are
5 a lot of pressures on an inquiry of this nature from
6 other sources and -

7 COMSR: I think that was amply illustrated this
8 morning.

9 MS NELSON: Yes, and possibly after this morning,
10 anything that we say is going to come as an anti-climax,
11 unless we sing our submissions. My view hasn't changed.
12 I expressed my view on Friday. Mr Abbott's obviously
13 had a change of heart since Friday, because on Friday he
14 had a view which we all shared that it probably was
15 impractical to proceed.

16 COMSR: I don't know, of course, that counsel
17 were aware of the nature of the evidence available to
18 counsel assisting, which, as I understand it, counsel
19 assisting believes does not raise an issue of s.35 and
20 which goes more to the question of the event that
21 occurred.

22 MS NELSON: That is certainly true and I accept
23 that. However - and I should say at the outset that I'm
24 thoroughly in support of this Commission getting on with
25 its work from your Honour's point of view, not the least
26 counsel. However, I've had the opportunity of looking
27 at Mr Denver's statement and I make two observations
28 about that. I am confident that someone - won't be me -
29 but someone at the bar table is going to ask him
30 questions, possibly in cross-examination, that will
31 raise the spectre of s.35. That then puts you in a
32 situation of perhaps having to adjourn the rest of his
33 evidence, and in a way I think it's undesirable, it's
34 difficult to -

35 COMSR: We have a lot of adjourned evidence at
36 present because of the way the Commission has been
37 conducted of not distributing statements which might
38 offend against s.35. This has meant, of course, that

1 persons have had to give their evidence and then counsel
2 have had an opportunity, in the interests of fairness,
3 of considering it before being called upon to
4 cross-examine. I certainly agree that that, in general,
5 is an undesirable course. It is only in the particular
6 circumstances of the nature of this Commission that it
7 has arisen. But where the evidence is of such a nature
8 that it doesn't involve those issues of privacy and
9 confidentiality, then certainly it is best to proceed to
10 deal with it.

11 MS NELSON: I don't dispute that. I simply say that
12 even though you have been told this in evidence, I
13 concede on the face of the first witness's statement,
14 doesn't mean that precisely that issue is going to
15 arise. I don't think it is helpful for you to have
16 part-heard evidence. It is very hard on the witness.

17 COMSR: If there is an issue that is likely to
18 arise like that, it seems to me to be a matter that
19 should be dealt with before the witness would be
20 permitted to be called, and then that there be some
21 argument at least addressed to me as to how the witness
22 can be called without running the risk of an
23 infringement of s.35.

24 MS NELSON: Yes. I think that that's certainly a
25 more desirable way of proceeding. I still think my view
26 is that this Commission will run into that issue in
27 relation to a lot of these witnesses that are said to
28 give evidence which is peripheral. I suppose it remains
29 to be seen, but certainly Mr Denver's, I believe, falls
30 into that category.

31 The other observation I make is that there is a
32 general view amongst some counsel that I have heard
33 expressed that they feel inhibited in even being able to
34 take instructions from their clients because of the
35 constraints of s.35. I suppose that might lead to a
36 situation where a witness believes he has completed his
37 evidence, if there is a valid authorisation pursuant to
38 s.35 and some instructions are taken, and there may be

1 an application for that witness to come back. That's
2 certainly a possibility. The whole situation is totally
3 undesirable for the work of this Commission and I just
4 wonder if it isn't perhaps better to adjourn the matter
5 and then start off when there is a valid authorisation
6 and take the evidence as it should be taken:
7 Examination-in-chief, cross-examination and the witness
8 is then released. I can't imagine there would be
9 anything worse for a witness than the sort of
10 uncertainty.

11 COMSR: The s.35 authorisation doesn't get
12 around that problem, because the information is not
13 divulged prior to the actual witness being called. In
14 some instances, of course, some counsel have not given
15 undertakings as to confidentiality and that involves
16 problems as to cross-examination.

17 MS NELSON: Perhaps you might be less sympathetic to
18 those people. It is not uncommon for all of us to
19 cross-examine on fairly short notice.

20 COMSR: Certainly, and counsel have strayed
21 somewhat from their specific interest at times.
22 However, Debelle J has identified an area of evidence
23 which, as I understand it, he considers is not such as
24 to invoke the provisions of s.35 and it appears to me
25 that if I'm satisfied that there is evidence of that
26 sort, it will have to be heard at some time and it
27 appears to me that if there is no problem raised with
28 s.35, then it would not be inappropriate to call
29 evidence.

30 MS NELSON: I don't disagree with that. All I'm
31 saying is that despite that assurance, everything tells
32 me that it is not going to be as straight forward as
33 that.

34 COMSR: You are saying that counsel might try to
35 inject a s.35 situation?

36 MS NELSON: It may be inevitable on the present
37 instructions. That doesn't affect me and I would seek
38 leave to withdraw for this evidence because I don't see

1 that it affects my client. I'm simply, in an endeavour
2 to assist the Commission, putting forward a view that I
3 have gathered over the period of this debate.

4 COMSR: I appreciate that.

5 MS NELSON: But ultimately it is your decision and I
6 accept that.

7 MR TILMOUTH: I wish to make some submissions and I
8 will be brief. I acknowledge the time limits. I
9 support Miss Layton's submissions for the reasons she
10 advanced. I support Miss Nelson submissions on the
11 practicalities or the impracticalities of the issue.

12 I make six additional points. Firstly, it seems in
13 the argument this morning to have been assumed,
14 especially with respect during Mr Abbott's submissions,
15 that the purview of s.35 relates to merely Aboriginal
16 tradition or more particularly the secret sacred secret
17 women's business.

18 COMSR: Yes, I suppose that is the most relevant
19 here. Of course, it does have a wider application
20 relating to sites and other matters, yes.

21 MR TILMOUTH: That is exactly the point 'Item, objects
22 or remains'. One must be guarded to propose that any
23 evidence did not touch those things, such as that would
24 affect grave sites, middens and the like. It pays to,
25 as you acknowledged, remember the very wide subject
26 matter of the section. In my submission, it was a bit
27 lost this morning.

28 Secondly, with s.35, I particularly support Miss
29 Layton on the public domain arguments. Because
30 something is in the public domain, doesn't necessarily
31 demonstrate that it's no longer under s.35. It assumes,
32 as Debelle J put it, that it is in the public domain
33 with the knowledge and consent of Aboriginal people.
34 That is from the passage that Miss Simpson said from the
35 judgment of Debelle J. When the argument has, of
36 course, been in the public domain enough, it may,
37 therefore, by definition, become not a divulgence or
38 infringement of s.35. It if has got into the public

1 domain in breach of the section once or even more times,
2 that doesn't make it any better and it doesn't make it,
3 none the less, otherwise than a breach of the section.

4 To translate Mr Abbott's submission, even if there
5 is to be a question which may arise from time to time
6 about whether s.35 arises, the onus of proof is not for
7 the objector to show that it has the capacity covered in
8 s.35. The onus of proof is to the person concerned, or
9 the witness concerned, or the party seeking to introduce
10 the material to demonstrate that the prima facie embargo
11 has been raised by a public disclosure or divulgence,
12 and that that divulgence has already had the consent of
13 the Aboriginal people to be made with their knowledge.
14 That puts it another way around, the onus of proof is
15 around the other way to show that it, in fact, has
16 already been made with the knowledge and the consent of
17 the Aboriginal people. A good illustration of that is,
18 in fact, the very illustration that Mr Abbott made
19 regarding Mr Clarke. As has been rightly acknowledged
20 on the clear say-so of Mr Clarke, this doesn't infringe
21 s.35 is plainly not binding. I made the point and
22 apologise for the interjection, but it was important we
23 sought to cross-examine Clarke about that evidence and
24 that was refused.

25 The point for the moment is that Clarke's assertion
26 that his material doesn't come within s.35 is very much
27 in dispute. In my submission, that being the case, the
28 cautious approach that you have adopted should pertain
29 also with respect to Clarke's material.

30 I also share the views of Miss Nelson about the
31 question of cross-examination. Some of us here are not
32 privileged to have Mr Denver's statement as yet. I will
33 come to that in a moment in another respect.

34 But, Madam Commissioner, it might be very difficult
35 to effectively cross-examine witnesses even though, on
36 the face of their evidence-in-chief there is no s.35
37 difficulty. It might be, nevertheless, quite difficult
38 to cross-examine them without breaching s.35, but, at

- 1 the moment, I do accept we have to raise that at the
- 2 time and demonstrate the point.
- 3 CONTINUED

1 But I anticipate that what Ms Nelson has put to you
2 about that, even without seeing Denver's statement, is
3 true.

4 Second to last: certain conditions, so to speak,
5 have been laid down by you to protect the information
6 illegally given, because of the invalidity of the
7 delegations. In my submission, though, they should go
8 wider to encompass instructions and statements that
9 people have taken from witnesses which touch upon s.35
10 which have not yet been tendered or submitted to the
11 Commission. The invalidity of s.35 not only effects our
12 ability in the future to take instructions, but it
13 necessarily taints the statements or instructions that
14 others have taken from witnesses or from potential
15 witnesses which intrude into that area. And, in my
16 submission, all of that material should be handed up by
17 all counsel concerned or their solicitors and, if they
18 are in doubt about it, they should hand it up as well to
19 ensure that there is no inadvertent breach of the s.35
20 requirement.

21 Finally, can I point out that when the delegation,
22 the original delegation of 27 July was struck down last
23 week by the Full Court, the delegation no.8:
24 'That any person seeking to take the benefit of this
25 authorisation must give any undertakings required by,
26 and comply with any directions or requirements imposed,
27 by the Royal Commissioner, whether as to confidentiality
28 or any other matter.'

29 Is also struck down.

30 No doubt the undertakings we have signed regarding
31 confidentiality would pertain because of ethical
32 considerations. Speaking for myself and Mr Kenny, we
33 would still think that they bind us, but the point is
34 that the undertakings in relation to witnesses or
35 clients giving evidence and this procedural unfairness
36 of giving some statements in advance to people who
37 signed such undertakings but not others, should also go
38 with it.

- 1 COMSR: They weren't the s.35 undertakings that
2 were required. The undertakings that are required of
3 counsel are undertakings as to confidentiality in broad,
4 as it were, and not related to s.35. But, in any case,
5 if those undertakings, as you say, go with the
6 authority, then, of course, there are the provisions of
7 the Act which come into operation. And, if the
8 undertakings go, I don't think that it can be said that
9 the orders that I gave concerning the dissemination of
10 the material go with it.
- 11 MR TILMOUTH: No, that is not my argument. In fact, I
12 thought I should raise it to be clear.
- 13 Our view is that the undertakings have a valid
14 existence independent of the authorisation. I accept
15 that. And it would be very wrong and a great
16 miscarriage if it were. It would in itself breach s.35.
17 However, these undertakings about people giving evidence
18 and not getting statements if you don't comply should
19 also go. This procedural unfairness should stop.
- 20 COMSR: There are good reasons why no statement
21 would be disseminated prior to a witness being sworn to
22 give evidence unless counsel -
- 23 MR TILMOUTH: Some of them have got one. Ms Nelson
24 says she has got one. We haven't got it. Most people
25 on this end of the bar table haven't got it.
- 26 COMSR: But I understand that some people have
27 not signed the undertakings as to the confidentiality.
- 28 MR TILMOUTH: No, that is not our understanding.
29 Given or not, it is whether an undertaking to give
30 evidence has been signed.
- 31 COMSR: No, an undertaking as to
32 confidentiality. Those statements should not be
33 disseminated before a witness gives evidence in the
34 absence of an undertaking as to confidentiality.
- 35 MR TILMOUTH: That undertaking has been executed by
36 the counsel and solicitor. The problem is the
37 undertaking to give evidence.
- 38 COMSR: That is a further undertaking.

1 MR TILMOUTH: Yes, and that cannot be validly made.
2 It falls with the delegations falling and, in any event,
3 it should be stopped as a procedural unfairness. It is
4 quite unfair for some people to have it in advance and
5 others not, simply because of the sheer fact that an
6 undertaking of giving evidence has or has not been
7 signed.

8 MR MEYER: I haven't got one either.

9 MR SMITH: No, and Ms Nelson's statement has been
10 retrieved from her.

11 MS PYKE: I certainly adopt the submissions of Ms
12 Layton and Ms Nelson and Mr Tilmouth. I just want to
13 emphasise that the first authorisation or the
14 authorisation no.1 in the authorisation of 27 July by
15 the Minister permitted the divulgence of information
16 which otherwise might contravene s.35 by person's his or
17 her legal representatives for the Royal Commission.
18 That authorisation has now been found by the Full Court
19 to be inappropriate or not lawful, depending on the
20 terminology you use. That, of course, presents for me
21 representing Dr Fergie very substantial difficulty. I
22 haven't seen any statements of the witnesses that we are
23 told will be called. It seems to me if Dr Fergie has
24 got any instructions for me in relation to
25 cross-examination about issues that may contravene s.35
26 she can't even tell me. So she will have some
27 information that I don't have. I won't even know
28 whether I need to reserve my right for
29 cross-examination.

30 COMSR: It is for that reason that I determined
31 that no evidence which touches on a s.35 matter will be
32 called pending the resolution of the authority.

33 MS PYKE: That begs the question, firstly, there
34 is a determination by counsel assisting or by you as to
35 whether the evidence will or will not contravene s.35,
36 but you are not in the mind of Dr Fergie who may have
37 some desperate instructions that we wishes to give me
38 about information that she has that will contravene

1 s.35. So she can't even tell me what it is that she
2 would like me to cross-examine on. And that is a very
3 real problem, because I will be going along absolutely
4 in the blind about whether there is something that
5 impacts upon Dr Fergie's position in the matter. That
6 surely the rules of natural justice are such that we
7 should not be put in that position?

8 The other difficulty, of course, is that, whilst it
9 is all very well to say that we can have an argument
10 about what does or does not contravene s.35, I am in the
11 same position. For Dr Fergie to instruct me about why
12 it is that it is her belief that a matter contravenes
13 s.35, she has got to be giving me information that in
14 itself contravenes s.35. And for me then to make an
15 argument to you that I believe that this evidence
16 contravenes s.35 because it is contrary to Aboriginal
17 tradition, to say that requires me to stand up here and
18 contravene s.35. So, my client contravenes it
19 instructing me and I contravene it by having an argument
20 with you.

21 That is an untenable position.

22 COMSR: Certainly it would be if the evidence
23 were of such a nature that it could involve s.35, but
24 where, for instance, the evidence to be led is of such a
25 nature that, for instance, it involves the geography of
26 the -

27 MS PYKE: That is a prime example. There may well
28 be things that I might have instructions to enquire
29 about, because it pertains to my instructions, that may
30 be a s.35 matter. That is what I am saying. It is all
31 very well for you or counsel assisting to say `We will
32 lead evidence that doesn't contravene s.35', but, from
33 my client's perspective, there may well be matters that
34 are important that I should be A instructed about and B
35 cross-examining about, but I am not even going to get
36 the instructions.

37 COMSR: Yes, obviously when it is proposed that
38 a witness be called, then it will be necessary to see

1 whether there is any prospect that s.35 is in -
2 MS PYKE: But how can I do that? Can Dr Fergie
3 simply say to me 'There are questions I would like you
4 to ask', and all I can stand up and say is 'I have some
5 instructions'? I am not able to look behind them. I
6 don't know if my client is instructing me appropriately.
7 I can't discuss it with her. I don't know whether I
8 should seek to cross-examine. I am saying from a
9 natural justice point of view it puts me in a most
10 invidious position having been given leave to appear in
11 the proceedings. I am told at the beginning of the
12 Commission that the whole findings and methodology are,
13 at one level, the nub of this hearing and I am having
14 half a dozen witnesses called where Dr Fergie in some
15 circumstances will not be able to give me instructions
16 if it is a matter - and the catch-22 is the more
17 relevant it is to Dr Fergie the less likely it is that I
18 am going to be asking questions or she is going to be
19 able to instruct me.

20 COMSR: And probably the less likely that that
21 type of evidence will be called, I think.

22 MS PYKE: That really does beg the question,
23 because, with every respect to counsel assisting, they
24 are not acting for Dr Fergie and they are not out to
25 look after Dr Fergie's interests. That is my role. I
26 can't rely upon counsel assisting. I have to rely upon
27 my client's instructions to me which I have got to be
28 able to take properly and fairly and present
29 appropriately. And I just cannot see how I can do that
30 if this matter proceeds.

31 MR SMITH: Can I just interrupt my learned friend?
32 The procedure which is to be adopted particularly
33 with the witnesses that are to be called in the next few
34 days, in the next week or so, is that there has not been
35 notice to any counsel about that. These are witnesses
36 that have been brought forward. They are being proofed.
37 Statements are being prepared. My instruction to you is
38 that you should take this evidence and that, to the

1 extent that counsel are not able to cross-examine
2 straight away, they can reserve their position and we
3 can have a day's break or whatever and call another
4 witness in chief and that original witness can come
5 back. This is not an unusual course in this sort of
6 inquiry.

7 COMSR: It is a very usual course in this
8 particular Inquiry.

9 MR SMITH: It has unfortunately become a practice
10 in this Inquiry and counsel may say it is difficult
11 because evidence-in-chief is given and one should be
12 ready to anticipate that and cross-examine immediately.
13 That is not possible. That is a luxury this Inquiry
14 cannot afford. We will address questions of natural
15 justice and fairness by giving people who are not ready
16 to cross-examine - providing that lack of readiness is
17 reasonable - providing them with the opportunity to take
18 instructions. And, if there are special problems with
19 s.35, there can be reservations of right to recall. And
20 there has been a direction sent to everybody that they
21 are to refrain from asking any questions that will raise
22 in the question itself s.35.

23 That is the way in which the Commission wants to use
24 the time that is obviously going to flow by unless and
25 until if an authority does come the delegate of the
26 Minister considers his position about the s.35
27 authority. And that is what I propose in relation to
28 the witness, Mr Denver, today. That no-one be forced
29 into a position to cross-examine him if they wish to and
30 are not in a position to.

31 MR KENNY: Just in relation to Mr Denver, in
32 particular, I understand he owns property on Hindmarsh
33 Island. I understand that he may or may not have had
34 some discussions with my clients concerning sites.

35 MR SMITH: Is there a tandem team operating here?

36 MR KENNY: This has been done by counsel assisting
37 and Mr Abbott and Ms Shaw.

38 Is there any difficulty with me having a comment on

1 something that is within my area of knowledge that I may
2 not have spoken to counsel about because the matter has
3 merely been raised at this time?

4 COMSR: Yes, if you can get to the nub of it, Mr
5 Kenny.

6 MR KENNY: The nub of it is Mr Denver owns
7 property. We are concerned there may be sites on his
8 property on the island that may or may not have been
9 discussed with my clients. The question of sites, as I
10 understand it, was covered by s.35 and the importance of
11 those sites or the significance of them. I am not in a
12 position to take instructions as to them, but I believe
13 that I need to take instructions in relation to that
14 particular area.

15 COMSR: Why would the question of sites have to
16 be raised if that were so?

17 MR KENNY: I don't know. I haven't seen his.
18 Evidence. I don't know, at this stage, but -

19 MR ABBOTT: Why don't you wait?

20 MR KENNY: I would like to be able to take some
21 instructions in relation to it. And I am merely raising
22 this as a practical problem that we have. That, if -

23 COMSR: But there is no secret that on Hindmarsh
24 Island there are sites.

25 MR KENNY: Correct.

26 COMSR: The problem that would arise would be if
27 you decided, as I understand it, to question Mr Denver
28 concerning them.

29 I am just trying to see why that would be necessary
30 in the context of the issues that are before me.

31 MR KENNY: Those are matters that I would need to
32 discuss with my clients. I cannot discuss that with my
33 clients. They consider the sites on that island to be
34 significant.

35 COMSR: I don't know, Mr Kenny. As I understand
36 what you have put to me from time to time you have a
37 distinct difficulty discussing matters with your
38 clients.

1 Have you from time to time had discussions with your
2 clients?

3 MR KENNY: Yes, I have had considerable discussions
4 with my clients. What I am saying is I have particular
5 difficulty now discussing with my clients anything that
6 may offend s.35.

7 COMSR: But, of course, from the practice
8 direction I have given, it is difficult to see how you
9 could raise that issue and comply.

10 MR KENNY: I can't. That is exactly right. The
11 practice direction you have given is that, if there is
12 something that offends s.35, presuming my clients - they
13 can't even tell me if there is or there isn't. They can
14 perhaps indicate that there is some difficulty. I then
15 cannot ask those questions, so I would ask that all of
16 these witnesses be recalled as minimum for
17 cross-examination at a later date, if required, if there
18 are matters that are raised. It raises - I am simply
19 raising the practical difficulty we are going to have.
20 And it may be - I agree, it may be over - but, if they
21 were all later recalled for cross-examination if an
22 authorisation is made -

23 COMSR: Of course, that may never be the case,
24 so I have to proceed on the assumption that I would
25 think that there may never be an authority. And, under
26 those circumstances, if anyone seeks to introduce
27 gratuitously, as it were, information of that nature or
28 questions designed to elicit any information of that
29 nature, it would be necessary for me to refuse to allow
30 that line of questioning to continue.

31 MR KENNY: I accept your practice direction. I
32 would not deliberately attempt to offend against your
33 practice direction. I accept your resolution as made.
34 I mean, I may protest against those rulings and say they
35 are inappropriate, they offend against natural justice
36 and a number of others, but I accept it and I won't
37 deliberately offend, if that is what you are thinking.
38 I don't think I offended. I have been accused in the

1 past of arguing with one of your rulings, but I dispute
2 that. But, apart from that, I accept your rulings and
3 will continue to do so in the future. But I am simply
4 saying that, if Mr Denver, for example, is going to be
5 called, there is a practical problem and that is my
6 submission and I simply add that to the other matters
7 that have been raised by Ms Layton, Ms Nelson, and
8 other counsel.

9 MR ABBOTT: It wasn't a practical problem for Mr
10 Wooley who was acting for the very same people that Mr
11 Kenny was from April 1994 until 1995 when he took
12 instructions.

13 MS LAYTON: That's got nothing to do with it and,
14 what is more, s.35 doesn't apply when one is dealing
15 with a s.10 enquiry. My friend is absolutely right off
16 on a tangent, as usual.

17 COMSR: Perhaps if counsels' submissions could
18 be addressed to me, rather than to one another?

19 I don't know whether counsel assisting wish to make
20 any more submissions?

21 MR MEYER: Have we reached the end. I have been
22 very patient and quiet.

23 I want to make the point that, firstly, it appears
24 to me that these difficulties of getting instructions
25 are more imagined than real. We have had these
26 suggestions made along the way on a number of occasions
27 and it hasn't been particularly difficult on the
28 material. The suggestions put by Ms Simpson can be
29 easily followed.

30 As I said on Friday, the losses that are being
31 incurred by my clients on this matter amount to \$20,000
32 a day.

33 COMSR: I can understand their interest in
34 wanting the proceedings to go ahead.

35 MR MEYER: We are here to push and I support the
36 matters that are put forward by both of your counsel
37 assisting in relation to that.

38 COMSR: There is a body of evidence of the type

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KC 20E

- 1 which has, as I say -
- 2 Am I forestalling anyone who wishes to make a
- 3 submission?
- 4 CONTINUED

- 1 MR BOURNE: I seek leave to make an application on
2 behalf of my client, Mr Doug Milera, who previously
3 withdrew from the commission. I will indicate it
4 doesn't touch on Section 35, directly or indirectly,
5 although that cloud hangs over anything I might seek to
6 obtain by way of the application I am going to make.
7 I believe you would have a letter by way of a formal
8 application from myself on behalf of Mr Milera dated 30
9 July, which I subsequently agreed with counsel assisting
10 could be deferred to a convenient time.
- 11 COMSR: You want me to look at that?
- 12 MR BOURNE: It is in respect of that application,
13 which doesn't touch on the Section 35 point, on which I
14 wish to address you this morning. But it does point to
15 whether and how this commission should proceed.
- 16 COMSR: Are you applying for leave -
- 17 MR BOURNE: To make an application.
- 18 COMSR: Or applying for leave to represent Mr
19 Milera?
- 20 MR BOURNE: I am applying for leave to represent Mr
21 Milera, insofar as that is necessary, in order to make
22 an application to you this morning, and whether that
23 leads to me being instructed to seek leave to continue
24 to appear in the commission at large, as it were, will
25 depend on the outcome of that application. It is really
26 in the nature of a preliminary interrogatory
27 application.
- 28 COMSR: Without going into the argument of the
29 application, can you tell me what it is you are seeking
30 leave to appear for the purposes of?
- 31 MR BOURNE: When I appeared previously in this
32 commission on behalf of Mr Milera, I think on three
33 separate occasions, I expressed each time he was
34 seeking, in relation to his interest in the commission,
35 all of the material which directly affected him and what
36 evidence he might be able to give.
37 I expressed the reservation that the instructions I
38 was getting at any particular time were subject to the

1 fact that I really needed access to all of the relevant
2 material. I have continued to make requests for
3 material. In fact, I have been given an undertaking on
4 31 July by counsel assisting, both orally and
5 subsequently in writing, that certain material would be
6 provided to me, and that no evidence would be called or
7 distributed in respect of matters directly touching upon
8 my client until I had been given that material and I had
9 been given the opportunity of obtaining instructions in
10 respect of it.

11 That material particularly affects evidence which is
12 proposed to be called, as I understand it, from Mr Kym
13 Denver, and subsequently from Mr Chris Kenny. The
14 matters which I wish to address you on are not merely
15 procedural in terms of getting on with it and see what
16 happens. The fundamental issues it raises is whether my
17 client would seek to be involved in the commission at
18 all, or, secondly, whether there is some challenge to at
19 least part of the evidence proposed to be adduced on the
20 grounds of, for example, illegality of that material. I
21 am there referring to, I understand, taped telephone
22 conversations which would breach the Telecom
23 Communications legislation, and they are matters about
24 which I need to take instructions.

25 I have been asking for that material since 23 June.
26 There have been a number of letters sent by me, formal
27 requests, culminating, as I say, in an undertaking by
28 counsel assisting to get that material to me. That
29 undertaking has not been met, and those requests have
30 not been acceded to.

31 COMSR: Am I right that you have withdrawn from
32 the commission?

33 MR BOURNE: I previously withdrew, having expressed
34 a reservation about that, but I continue to act for Mr
35 Milera, and I continue to represent him in relation to
36 the matter. He has an interest in the commission, an
37 interest which was previously recognised by you when
38 leave for me to represent him was granted. That leave

1 was not withdrawn at the instigation of the commission
2 or anyone else. I simply was instructed to withdraw,
3 which is a relevant distinction, in my submission.

4 He remains a potential witness in the matter. He
5 remains a person who may be compelled to give evidence,
6 depending on how the commission rolls along, as it were.
7 He may be the subject of an application by any other
8 party or person for him to be compelled. In respect of
9 each of those matters, he is a person who has an
10 interest in the commission.

11 He has instructed me to make an application this
12 morning of a particular type. I ask to make that
13 application, and for you to rule upon it. It really
14 goes, essentially, to getting material which I need in
15 order to advise him. If the material which is proposed
16 to be adduced doesn't touch on Section 35, then it seems
17 to me there is no reason why it certainly could not now
18 or at some previous time have been given to me.

19 I could well have had instructions before today
20 about the material which it is proposed to be adduced.
21 I don't have those instructions, and the reason I don't
22 is because my previous requests have been, not ignored,
23 but they have resulted in an undertaking which has
24 simply yet not been met.

25 COMSR: You appreciate, of course, that
26 statements cannot be released prior to the witness
27 giving evidence unless there is undertakings of
28 confidentiality in any event because, of course, those
29 statements are not protected necessarily by the
30 provisions of the Royal Commissions Act.

31 MR SMITH: I could perhaps help my learned friend
32 and perhaps short-cut this debate. The events were
33 really these. On 24 July, Mr Bourne withdrew,
34 indicating that his instructions were terminated. That
35 is at p.74 of the transcript. He then wanted to make a
36 statement in the commission, which was refused. He
37 handed that statement to the media, after asking you to
38 protect his client from the media.

1 Obviously thinking better of the fact that his
2 instructions were terminated and he no longer acted for
3 Mr Milera, he wrote to the commission and that letter
4 was on 28 July, saying that indeed he was acting. `We
5 confirm that we are retained by Mr Milera to act on his
6 behalf and requesting any material from Channel 10,
7 including audio tapes'.

8 On 31 July we did indeed indicate to Mr Bourne that
9 we would provide him with what was then outstanding, an
10 audio tape. We had sent him a copy of a composite
11 television interview provided by Channel 10, and
12 provided by Channel 10 with the express indication to us
13 that we could provide it to Mr Bourne for Mr Milera,
14 since it concerned him.

15 However, the audio tape hadn't been processed or
16 transcribed, as I understand, at that stage. But at the
17 time, Mr Bourne withdrew from the commission, and Mr
18 Milera, in effect, walked out and gave a television
19 interview in which he said that, even if he were
20 subpoenaed, he would not speak, or words to that effect.

21 It became necessary then for the journalist, Mr
22 Kenny, to be a witness, as it were. He immediately
23 obtained legal representation and is represented at the
24 commission today by Mr Lovell, represented by the
25 solicitors Finlaysons. So that the situation changed
26 greatly. The audio tape that Mr Kenny had, and the
27 transcript that he had made of it, became, as it were,
28 part of his evidence.

29 The practice that had been adopted by the commission
30 was that, where witness statements were not provided by
31 one party, they did not get witness statements that were
32 willingly provided by others until a witness gave
33 evidence. Questions of natural justice and fairness, et
34 cetera, were addressed by allowing - shall I call it -
35 an unco-operative witness the opportunity to take
36 instructions and to effectively cross-examine.

37 It is so that I have not provided Mr Bourne with the
38 audio tape of some conversation with Mr Kenny, and nor

1 will I, unless directed to by you, Commissioner. He
2 will get that material in the normal course, subject to
3 any other rulings or practice directions when Mr Kenny
4 gives his evidence, and it will be distributed in the
5 normal way. So that is the position, if it assists, in
6 relation to Mr Milera and Mr Bourne.

7 MR BOURNE: Commissioner, to the extent that counsel
8 assisting suggests there was a turnaround in my
9 instructions, it is a case of the pot calling the kettle
10 black, because there has been a complete turnaround in
11 the attitude of counsel assisting with respect to
12 disclosure of that material to me.

13 I wasn't aware, until I discussed the matter with
14 him yesterday, the reasons for that, and they are the
15 reasons he has just given. I was never asked to give an
16 undertaking. I was never explained that the material
17 would not be forthcoming. I asked for, by letter, all
18 relevant material, all video and audio tapes and/or
19 transcripts of interviews involving Mr Milera, and which
20 it is said touch upon matters relevant to the Terms of
21 Reference.

22 In response, I was given an undertaking, then
23 confirmed in writing, 'There is, in addition, an audio
24 tape which has been provided by Channel 10 to the
25 commission. A copy of that audio tape' - this is as at
26 31 July, four weeks ago - 'is currently being prepared
27 for your client and will be forwarded to you, together
28 with the video tape you have already seen as soon as it
29 is available'.

30 Later in the letter 'In addition, I confirm that
31 should further material, other than that previously
32 disclosed to you, come to hand, it will not be disclosed
33 to any other person or party, or in any way published,
34 until you have had the opportunity of considering it and
35 advising your client'. I have not had that opportunity
36 despite that, and I am not going to get that opportunity
37 now according to Mr Smith this morning.

1 MR SMITH: What are we to make of the statement
2 that was given out to members of Parliament and the
3 media, where Milera says 'I do not believe I can
4 usefully add to what I have provided to counsel
5 assisting this commission' et cetera 'I decline to be
6 further involved'? What is the position?

7 MR BOURNE: That was, as at that time, when he had
8 certain information when he had expressed three times,
9 no less, in this commission the fact that he wanted the
10 information which directly touched upon him to be
11 provided. The position which my friend has just
12 referred to there was exactly the same position as at 31
13 July, when counsel assisting gave the undertaking.
14 Nothing has changed since that particular point in time.
15 I was promised material, and I have not yet seen it.
16 My client has to make a decision whether to seek to be
17 involved, whether to challenge the legality or
18 illegality of evidence proposed to be adduced. How can
19 I do that without having the material? It is a complete
20 affront to natural justice.

21 MR SMITH: Why does Mr Bourne arrive today, of all
22 days, to lament this?

23 MR BOURNE: Because as at 31 July, having said the
24 matter could be deferred to a convenient time to suit
25 the commission and counsel assisting should an
26 undertaking be given, having been given that
27 undertaking, there was absolutely no reason for me to do
28 anything about it until I was told the undertaking was
29 not to be met. That happened at 4 o'clock the evening
30 before last. I spoke to counsel again yesterday.

31 Can I make an important point about my client's
32 attitude to his involvement in this commission? It
33 arises out of a ruling which you, in effect, gave I
34 think on 31 July, and which is contained in the
35 transcript at p.130. My client's attitude towards being
36 involved in this commission or not was at that time, and
37 subsequently, based at least partly on the ruling which
38 you made in respect of statements made other than in the

1 commission. At p.130 of the transcript you said this:
2 `There is another matter that I thought I would mention.
3 I referred briefly to the matters of statements which
4 are made and published in the media, or shown on
5 television by persons who apparently have knowledge of
6 the matters being inquired into by the commission. A
7 statement to a newspaper or shown on television is not
8 evidence before the commission. It does not become
9 evidence until such time as the person appears at this
10 hearing and, in the witness box, gives testimony, or
11 until his statement is tendered and received in
12 evidence. Counsel are no doubt well aware of this'.

13 I was, and I continue to be, aware of that, until I
14 found out on the day before yesterday, very late in the
15 day, that it is proposed, as I understand it, from the
16 witnesses who are to be called, the three named to give
17 evidence when the hearing resumes by way of evidence,
18 and subsequently Mr Kenny, that a statement given by my
19 client in a television interview apparently is going to
20 form part of the evidence of this commission.

21 My client says it cannot have it both ways. The
22 statement which he made, and did not give to the media
23 until after he had provided it to counsel assisting, his
24 statement to this commission which was given to counsel
25 assisting before anyone else saw it, if that doesn't
26 constitute evidence, nor should anything else he has
27 said to any other person by way of a television
28 interview, or by way of a purported letter to Mr
29 Tickner, or by a statement to anybody else.

30 If, on the other hand, counsel assisting is going to
31 call witnesses to say that my client gave them a
32 television interview, and that is to be evidence before
33 the commission, so too should his witness statement by
34 which he has retracted previous statements, and by which
35 he still stands.

36 It was on that basis that my client took a certain
37 view in relation to whether he had been involved or not.
38 It is a complete affront to natural justice, in my

1 submission, for him to be, in effect, accused and
2 subsequently tried in his absence, when up until now we
3 have been told 'No, that will not be pursued'.
4 COMSR: Nobody has been tried in this hearing.
5 MR BOURNE: They are very serious allegations being
6 made.
7 COMSR: Everyone seems to have the attitude they
8 are being tried. I cannot find anyone guilty of
9 anything. I am not required to. I only have to address
10 my mind as to whether or not a fabrication was made.
11 MR BOURNE: The allegation is the fabrication, as I
12 understand it, was at least, if not made by my client
13 directly, he was a party to it. That is an allegation
14 and he is on trial, in effect, with respect of that.
15 Otherwise there would be no point in the evidence.
16 In my submission, it is an affront to natural
17 justice for him to be denied the access to the material
18 before it is presented to this commission. He should be
19 at least given the opportunity of deciding whether tape
20 recordings of telephone discussions which, on their
21 face, may well contravene Commonwealth legislation or
22 possibly State legislation against their process - I
23 don't know yet whether they do or they don't because,
24 despite that undertaking, I have not yet been given that
25 information. Once I have, I can obtain instructions on
26 it.
27 It is for that reason that we seek to know what are
28 the allegations, and how they directly affect my client.
29 It is only fair, in my submission, that having been
30 asking for that information since, as I say, 23 June
31 this year, we should be given access to it.
32 COMSR: Of course, you would hear the
33 allegations during the course of the hearing in the
34 normal course of events, because that is when the
35 evidence is given by the witness. But I must admit it
36 seems a rather tangled web that you are describing at
37 the present time. I think I am going to have to give
38 some thought to what it is you are putting to me. I

1 don't understand you to be making an application to
2 appear.

3 MR BOURNE: I am certainly making an application to
4 appear.

5 COMSR: You are making an application for the
6 release of material, as I understand it.

7 MR BOURNE: To appear to make that application and
8 to obtain -

9 COMSR: You are making application to appear for
10 the purposes of making the application, and that is as
11 far as I understand it.

12 MR BOURNE: Indeed.

13 COMSR: As I say, I think I will need to give
14 your application a little bit of thought.

15 MR BOURNE: I would ask you to take into account the
16 three or four page letter which I sent on 30 July, by
17 way of outlining the grounds of that application. I do
18 not need to take you through them in detail now.

19 MS LAYTON: Could I make a few quick points in
20 reply? The first is with regard to the matters raised
21 by Debelle J in the Full Court. I point out that they
22 were in fact obiter. There was no addressing of those
23 issues before the court by either the parties, and they
24 are his own observations made, and they were not
25 specifically endorsed by either the Chief Justice, nor
26 Bollen J. They were clearly his own view, and, in our
27 submission, it was obiter. There was no submission made
28 of the sort that has been made before this commission.

29 Secondly, Debelle J did not have before him the
30 evidence that this commission has, and also the
31 submissions that have been made now by a number of
32 counsel as to the difficulties which would arise, both
33 as to principle and also as to practicality of the
34 commission continuing.

35 Finally, as my learned junior, Mr Collett pointed
36 out, Doyle CJ, when we did seek an injunction with
37 regard to the Royal Commission continuing, went on to
38 say that it would require further submissions and that

1 there were time constraints which wouldn't allow
2 appropriate argument to be addressed on the matter.

3 But the point that I make now, in finality, is that
4 for all of the reasons that have been given in
5 submissions, in particular from Ms Nelson, Mr Tilmouth
6 and Ms Pyke, the situation is that a highly artificial
7 environment is now being given for witnesses for whom it
8 is asserted by counsel assisting the Royal Commission do
9 not give rise to Section 35. There are considerable
10 difficulties, it is a risky process, and it is all for
11 the purpose of trying to maintain an artificial time
12 limit.

13 CONTINUED
14

1 Here, the issue is a question of natural justice versus
2 time and we would strongly urge that the Commission
3 should consider the natural justice issues and not the
4 question of time which can always be extended. It is
5 not talking about a year's extension, six months
6 extension. As I understand this evidence, it is to be a
7 week or two at the most. That should not be an
8 impediment to a process of appropriate order of natural
9 justice in the hearing of the Commission. That
10 completes my submissions.

11 MR SMITH: Could I suggest that while you consider
12 that welter of submissions and argument and banter, that
13 we don't commence Mr Denver's evidence until 2.15.

14 COMSR: I have to give consideration to the
15 question of Mr Denver and what, or whether or not it is
16 demonstrated that no s.35 issue will arise. So that is
17 a matter that perhaps - what I would do at this stage is
18 adjourn until 2.15 and counsel assisting might consider
19 that particular aspect of it, unless you wish to deal
20 with it now?

21 MR SMITH: Mam, I don't want to deal with it now.
22 I want the practice followed, and the practice followed
23 in Mr Denver's case is going to be that he will give
24 evidence and that when he gives evidence, his witness
25 statements will be distributed.

26 COMSR: Perhaps I haven't made myself clear.
27 What I've indicated is that I will only be considering
28 the calling of evidence which clearly does not involve a
29 s.35 issue.

30 MR SMITH: It's my submission to you - and I'm
31 happy to confer with you during the two hours that we
32 have got to leave you not uncertain about the question
33 of whether Denver's evidence touches on questions
34 relating to section 35. I don't see -

35 COMSR: I appreciate that naturally in the
36 circumstances you wouldn't be -

37 MR SMITH: I dont think it would be, but if
38 everybody has input into the topic. I think it's a

1 matter for you and me.

2 MS LAYTON: At this stage nobody has got statements
3 except very few counsel.

4 COMSR: I don't think any counsel has the
5 statement.

6 MR TILMOUTH: Miss Nelson has it.

7 MS LAYTON: Miss Nelson has one.

8 MS NELSON: I haven't got it any more, it was
9 snatched back.

10 MR TILMOUTH: What harm is there in giving the
11 statement now? If Mr Smith is worried about
12 publication, I'm happy to give the undertaking that I
13 will only talk about it with Mr Kenny. What difficulty
14 is there?

15 COMSR: I haven't seen it, but what has been put
16 to me is that there may be a s.35 implication. I will
17 have to be satisfied of that so I have to hear -

18 MR TILMOUTH: Could I ask that once you have had a
19 look at it, if there is no problem, could it be given to
20 us on the undertaking we use it between counsel until
21 2.15? If there is a problem -

22 COMSR: You see, counsel may well want to say to
23 me when it's released to them at 2.15 `You may not think
24 there's a problem, Commissioner, but I would like to
25 address you'.

26 MR TILMOUTH: That is true. But it's only postponing
27 the issue.

28 COMSR: Well, you see, it's postponing the issue
29 in one way, but what I have to satisfy myself of is that
30 there is not a s.35 problem.

31 MR TILMOUTH: I accept that. Once you have done
32 that, I can't see any harm in releasing it to counsel
33 rather than to wait for 2.15.

34 COMSR: As I say, I might say that, but someone
35 might wish to be heard once the statement is released.
36 I appreciate that this is going to be a time-consuming
37 way of going about it, and I wish there were another way
38 of doing it, but, consistent with the direction I have

1 given, I don't think that I should follow that course.

2 I propose to adjourn now until 2.15.

3 ADJOURNED 12.20 P.M.

4 RESUMING 2.19 P.M.

5 COMSR: I realise, Miss Layton, that I finally
6 haven't made any orders sought by you and that's
7 probably had the unfortunate effect of making you wait
8 for a couple of hours until that got dealt with.

9 MS LAYTON: I'm quite happy to do so.

10 COMSR: I propose to make an order which, in
11 effect, might catch any material which has been
12 overlooked, Miss Layton, and so I make an order.

13 In so far as it may be necessary to do so, I direct
14 that all persons who have received information from the
15 Commission by way of reports, copies of exhibits,
16 statements of witnesses, transcript of evidence, which
17 information has been the subject of restricted hearing
18 of evidence and suppressed from publication, return that
19 material to the Commission by 1 p.m. on Thursday, 31
20 August 1995. And I rule that pending the determination
21 by the Minister on the matter of the issue of a s.35
22 authority, I propose to proceed only to hear such
23 evidence as does not dilvulge any information contrary
24 to s.35 of the Aboriginal Heritage Act.

25 Now, are there any other matters, Miss Layton?

26 MS LAYTON: No. Thank you.

27 MR MEYER: Can we ask the reporter to make that
28 page available to us before we leave tonight so that we
29 have the transcript there?

30 COMSR: Certainly.

31 MS NELSON: Might I seek leave to withdraw? I
32 understand that the evidence proposed to be led doesn't
33 affect my clients interests and Mr Smith assures me that
34 if anything should transpire that may somehow effect
35 him, I will be notified. And on that basis, subject to
36 your leave, I withdraw.

37 COMSR: Certainly, Miss Nelson, you have leave
38 to withdraw.

1 MISS NELSON WITHDRAWS AT THIS STAGE

2 COMSR: Any other parties seeking leave to
3 withdraw at this stage?

4 MR SMITH: There is Mr Bourne's application to deal
5 with. Mr Lovell, who represents Chris Kenny, has
6 indicated to me that his client does not consent to any
7 release of material, such as the audio tapes, to Mr
8 Milera's legal representative at this stage.

9 COMSR: There is the further matter of any
10 statements that have been made. When the Commission
11 first invited persons to come forward to give statements
12 to the Commission, there was an undertaking published at
13 that time that no such information would be divulged
14 prior to the witness being called to give evidence. As
15 I understand it, with Mr Denver, there is no release
16 from that undertaking?

17 MR SMITH: No, but I understand that Mr Bourne's
18 application at this stage is for the audio tape relating
19 to a conversation between his client and the journalist
20 Chris Kenny.

21 MR BOURNE: And in relation to an audio tape of a
22 discussion between my client and Mr Denver. Both of
23 those tapes are tapes which were brought into existence
24 before the parties were invited, or sought to give
25 evidence. I'm not seeking their statements. I'm
26 seeking the tapes made of telephone discussions with my
27 client. That is what I'm seeking and that is what I've
28 been seeking for some almost 10 weeks.

29 COMSR: They have -

30 MR SMITH: They are the subject of evidence. They
31 are not going to be given to my friend, Mr Bourne,
32 before the witnesses give their evidence.

33 MR BOURNE: I take it that is an admission rather
34 than a ruling. I ask for a ruling from you, Madam
35 Commissioner, that they be provided. I have previously
36 had an undertaking they would be and I pursue my
37 request.

38 COMSR: It may be an undertaking - as I

- 1 understand it, we, the Commission, does not have to
2 release that material from the witness. And in view of
3 the undertaking that the Commission has given not to
4 release material prior to a witness being called to give
5 evidence, I don't see how I'm in a position to force the
6 request that the witness give up that information at
7 this stage. Of course, it will be made known to you.
8 I'm not saying that you won't hear it. What I'm saying
9 is that prior to the witness giving evidence, apparently
10 there is no way that that can be done.
- 11 MR BOURNE: It can be done by your Honour exercising
12 your powers -
- 13 COMSR: It is not consistent with the
14 undertaking which the Commission gave initially as to
15 confidentiality. If in the final analysis that is going
16 to cause some problem as far as you're concerned, well,
17 then an application can be made to me. And if you
18 require time to consider the situation, well, that's a
19 matter that can be dealt with by the Commission.
- 20 MR BOURNE: That is why I make the application now.
21 I first made that by a letter dated 30 July. The
22 undertaking was given the next day and confirmed in
23 writing. Now, the evidence of Mr Denver is about to be
24 led -
- 25 COMSR: That's correct. And I said that there
26 will be no delay if you remain here because the evidence
27 would be available to you.
- 28 MR BOURNE: I would simply need to object to the
29 evidence being led so that I can go and get instructions
30 about it.
- 31 MR SMITH: You don't even have leave to appear.
32 What is Mr Bourne's position?
- 33 MR BOURNE: My position is that I don't seek leave
34 to appear at large because I don't yet have sufficient
35 instructions and I have not been able to get sufficient
36 instructions and I don't know what the material is that
37 is going in. The point I make is that there is no
38 natural justice for my client to be put on trial here on

1 the basis of evidence, tapes of telephone conversations
2 involving him which have been asked for and he has been
3 told we would be given and we are told that we can't
4 have them until we are involved in the Commission and we
5 are told we are not involved in the Commission because
6 we don't have the leave. Now, the first he will hear of
7 it is after he reads about it in the newspapers.

8 COMSR: Often with commissions of inquiry, that
9 is not an unusual situation.

10 MR BOURNE: That is a situation we are trying to
11 avoid so that my client has the opportunity of receiving
12 appropriate legal advice about what is about to be used,
13 at least on my instructions, against him. If he is
14 denied that opportunity, he hasn't had a fair go.

15 COMSR: He will be given a fair go when the
16 material has been led and he would be given such
17 opportunity as he needs to consider that material, but,
18 as I say, he is not on trial.

19 MR BOURNE: He can't wait until the evidence is
20 given. My instructions are limited to making this
21 application to get the material. The question of
22 whether that material was even legally obtained is
23 something about which I would need to get instructions
24 on before somebody produces that in this Commission. I
25 don't know what the material is, when the conversations
26 are alleged to have been taped. Until I do, I can't
27 begin to advise my client whether that was obtained
28 legally or illegally. That is a fundamental question,
29 it seems to me.

30 MR SMITH: Why don't you ask him?

31 MR BOURNE: I have, and he doesn't recall the
32 conversations at the various times -

33 COMSR: I don't want to hear evidence from the
34 bar table. The fact is that you are not seeking to
35 appear on behalf of the parties?

36 MR BOURNE: Not unless I know what the material is
37 on the face -

38 COMSR: I take it that you are not seeking

1 leave. That being the case, no issue arises really of
2 providing you with the material. So that under those
3 circumstances - I mean, you can remain and hear what it
4 is, but I take it that at this stage you are not seeking
5 leave to appear?

6 MR BOURNE: No. I take it from your ruling that the
7 Channel 10 interview, if I can refer to it that way,
8 which was broadcast on TV is proposed to be received
9 into evidence at this stage, even though my client is
10 the author of it and won't be called to give evidence?

11 COMSR: I mean, no doubt that question will
12 arise at some time.

13 MR BOURNE: It arises now if that is the point of
14 the evidence being given. I assume from that that the
15 video tape of him saying one thing would be shown as
16 evidence and yet the statement provided to counsel
17 assisting is not accepted as evidence.

18 COMSR: It's up to counsel assisting. You are
19 not a party to the proceedings. You are not seeking to
20 be a party.

21 COMSR: If the Commission pleases.

22 MR SMITH: Mr Bourne must understand that as that
23 evidence proceeds, he has got no right to be heard.

24 MR BOURNE: I understand that fully. That is why I
25 made the application to inform my client to give him
26 legal advice before the evidence is called.

27 COMSR: I haven't ruled whether the evidence is
28 going to be called at this stage because there is a
29 preliminary issue. As I have previously indicated, I
30 wouldn't propose to hear any evidence which involves a
31 contravention of s.35 of the Aboriginal Heritage Act.
32 It hasn't been necessary for me to consider and rule
33 upon this in the past because of the authorities that we
34 were apparently clothed with at the time.

35 MR SMITH: Before you proceed, there is no - Miss
36 Layton and Mr Collett don't need to be at the bar table
37 at this stage.

38 MS LAYTON: I'm quite happy to be sitting in the

1 back. I didn't want to make an issue of moving. I am
2 quite happy to sit in the body of the Commission.

3 MS PYKE: We, at this stage, seek leave to
4 withdraw. I've discussed the matter with counsel
5 assisting and I understand that he is happy to read onto
6 the transcript the nature of our withdrawal and our
7 right to cross-examine.

8 MR SMITH: It's agreed that between myself and my
9 learned friend, Miss Pyke, that I hold the view at this
10 stage - and it's a view which is very much personal to
11 me and, therefore, Miss Pyke might take a different view
12 later and, therefore, need to reserve her rights - but
13 the evidence to be called from the witnesses listed in a
14 letter to Miss Pyke's instructing solicitor on 28 August
15 is not, on the face of it, evidence which is directly
16 relevant to Dr Fergie's interests in this Commission.
17 However, on the understanding that I acknowledge that
18 matters pertaining to Dr Fergie's interest may become
19 apparent after the statements have been tendered and
20 after the evidence has been given, it is agreed that
21 Miss Pyke and Miss Pyke's instructing solicitor will not
22 attend the commission's hearings during the course of
23 this evidence but will be provided with copies of their
24 statements, transcripts and any exhibits and will have
25 the opportunity to listen to any audio tapes and such
26 video tapes that might be involved also at the
27 conclusion of the evidence of all of those witnesses and
28 will have the right, should Miss Pyke and her
29 instructing solicitor and her client take the view that
30 some of those witnesses do involve Dr Fergie, to have
31 them recalled.

32 COMSR: Is that the statement that you wanted?

33 MS PYKE: Yes. That is as much as - we don't want
34 to waste funding and the like by being here if this is
35 not necessary, but, at the same time, to reserve the
36 right to cross-examine if needs be.

37 MR SMITH: And the same would apply to my learned
38 friend Mr Stratford who represents Mr Wooley. I give

1 the same undertakings in relation to Mr Wooley and Mr
2 Stratford. I don't think any of the coming material, at
3 least in the next few days, would affect Mr Wooley.

4 COMSR: That is the case? You are satisfied
5 with that undertaking.

6 MR STRATFORD: Yes.

7 COMSR: Are there any other preliminary matters?

8 MR SMITH: No.

9 COMSR: As I have previously indicated, the only
10 evidence I propose to hear is that which doesn't involve
11 a problem with s.35 of the Aboriginal Heritage Act. You
12 indicated, I think, that there may be sensitive areas -
13 if I can put it like that - that I will have to
14 consider, so perhaps if you explain to me what the
15 situation is.

16 MR SMITH: Addressing the evidence of Kym Denver
17 who will occupy today and probably tomorrow also, it's
18 our contention that this man's evidence does not
19 infringe s.35, because anything said by him, or rather
20 that said by him to Mr Douglas Milera which is going to
21 be the subject of evidence via an audio tape, has been
22 widely broadcast in both the electronic and print media.
23 This evidence, that is what is recounted to him by
24 Douglas Milera, very briefly makes general reference to
25 barrages, women's anatomy, birth and reproduction and
26 that is in a taped telephone conversation with Douglas
27 Milera.

28 CONTINUED

1 These topics - and I emphasise no great detail is
2 offered by Milera in his conversations with Denver about
3 these topics - have been widely canvassed and published
4 in the print and electronic media and, in order to
5 enable you to have confidence in receiving this
6 evidence, I draw your attention to that media now. And
7 I will take this opportunity to tender it as I do draw
8 attention to it.

9 All counsel have been provided with copies of the
10 media releases to which I am referring, so that further
11 copies are not intended to be handed out, but I will
12 detail it, so that counsel can locate the particular
13 references.

14 The starting place should be the Terms of Reference,
15 because occasionally in these hearings when topics are
16 raised people jump to their feet and, as a matter of
17 precaution, you have sometimes closed the hearings, out
18 of an abundance of caution.

19 I draw your attention, first of all, to the
20 definition of women's business at the conclusion of the
21 Terms of Reference. Women's business is defined in the
22 final paragraph of the Commission as:
23 `... the spiritual and cultural significance of
24 Hindmarsh and Mundoo islands, the waters of the Goolwa
25 channel, Lake Alexandrina and the Murray Mouth within
26 Aboriginal tradition of Ngarrindjeri women which is
27 crucial for the reproduction of the Ngarrindjeri people
28 and of the cosmos which supports their existence.'

29 As soon as that topic has been raised on occasions
30 in these hearings people have referred to s.35.

31 Can I start by referring you to - I was intending to
32 refer you initially to the report of Professor Cheryl
33 Saunders. That is Exhibit 17 in these proceedings. I
34 think at the time it was tendered as a matter of caution
35 you suppressed it from publication. It is my submission
36 to you that that is not a document that needs to be
37 suppressed. It is not caught by s.13, the s.13
38 documents involved in the Federal Court hearing and it

1 is not a document for which, for instance, the ALRM
2 claim s.35 problems.

3 So, I invite you, at this stage, if you are so
4 minded, to release the suppression order in respect of
5 that report. If anyone wants to contend that that is
6 not a public document, then let them do so.

7 COMSR: I don't know that it is necessary for me
8 to even consider releasing the suppression order -

9 MR SMITH: To allow me to suppress it. Perhaps I
10 will remind everybody in the courtroom, particularly the
11 media, that, at the moment, then, until you do that, the
12 report is suppressed. It won't stop me making the
13 submission. So, you can deal with that later if you.
14 Like.

15 MR MEYER: In respect to it being a public
16 document, if it assists in any way, my instructions are
17 that you can go to the Government Printers, you can go
18 and buy a copy for \$10.00 and anybody here can go and
19 buy a copy for \$10.00 if they want one and, therefore,
20 it must be publicly available.

21 MR SMITH: I will make the submissions in respect
22 of it and you can consider your position.

23 COMSR: All right.

24 MR SMITH: I don't think anyone is contending
25 otherwise.

26 Do you have a copy of that exhibit in front of you?

27 COMSR: Yes.

28 MR SMITH: And I think all counsel have a copy of
29 it and I won't be laborious about it, but, going to p.5
30 - and I will just take you quickly through what is said
31 by Professor Saunders at various places in her report -
32 at p.5 is the first reference that I draw your attention
33 to, at about p.5.5, where Professor Saunders makes the
34 point that representations have been made to her:
35 ` ... by a large representative group of Ngarrindjeri
36 women, speak of the spiritual and cultural significance
37 of Hindmarsh and Mundoo islands, the waters of the
38 Goolwa channel, Lake Alexandrina and the Murray Mouth

1 within the sacred traditions of Ngarrindjeri women,
2 crucial for the reproduction of the Ngarrindjeri
3 people.'

4 And so on.

5 Can I take you quickly then to p.26, where Professor
6 Saunders makes the point that Doreen Kartinyeri and
7 Sarah Milera are two of her informants.

8 I will make the point about that later.

9 I take you to p.31 and the final paragraph on p.31
10 of Professor Saunders's report:

11 `In essence, the Ngarrindjeri women regard the Murray
12 Mouth area in general and Hindmarsh and Mundoo islands
13 and the surrounding and separating waters in particular
14 as crucial for the reproduction of the Ngarrindjeri
15 people and their continued existence. This tradition is
16 not mythological but spiritual and an actual reflection
17 of traditional practice, handed down from mother to
18 daughter, drawn out of the landscape itself. In the
19 words of Doreen Kartinyeri "This is not just a dreaming,
20 it's a reality."'

21 Over on p.32, there is reference there, at the
22 bottom of the top paragraph on p.32, to the concerns of
23 the women, about the impact on the island, of
24 construction of the bridge, including the effect of
25 construction on the bed of the Goolwa channel.

26 At p.38, reference to Dr Fergie's report, at about
27 .7 of the page:

28 `Dr Fergie's report describes the area of the Lower
29 Murray, Hindmarsh and Mundoo islands, the waters of
30 Goolwa channel and Lake Alexandrina and the Murray
31 Mouth as "crucial for the reproduction ... '

32 Etc., and I have repeated that before.

33 I take to you p.40, at .2:

34 `Sarah Milera and Doreen Kartinyeri both described to me
35 the effects of the physical damage to the land and
36 Goolwa channel beds in terms of physical damage to their
37 own bodies.'

38 At the bottom of the page, there is talk about the

1 barrages and ferry cables.

2 And then, at p.41, there Professor Saunders
3 particularises a distinction between the bridge and
4 other links between the island and the mainland,
5 including the barrages:

6 `Doreen Kartinyeri suggested to me that in a sense, the
7 barrages aid the proper functioning of the Lower Murray
8 waters in modern conditions and drew an analogy with a
9 pacemaker. Another distinction may lie in the
10 permanence and solidness of the bridge, compared to all
11 other links, including the barrages.'

12 And, at the bottom of p.41, Professor Saunders
13 Quotes from Dr Fergie's report again and quotes, amongst
14 other things, that the bridge would be:

15 ` ... destructive for their tradition as she believes
16 this bridge will be, then their culture will be dead
17 another way. To fail to protect your culture when you
18 are disempowered is no shame.'

19 At p.42, Professor Saunders makes the point that the
20 anthropologist, Lindy Warrell, at the top of the page,
21 expressed she had no knowledge of the woman figure
22 legend.

23 And then Professor Saunders, at .5 of the page, on
24 p.42, quotes again from Dr Fergie's report. Although it
25 is a quote actually from a description in the
26 descriptive appendix:

27 `A critical point may be that Kumarangk and Mundoo can
28 only go together when they are mediated by the
29 life-supporting waters of the Goolwa channel. The
30 complex relationship between contingent separation and
31 the togetherness of life and death is achieved by water.
32 The separation of all the major organs in this system is
33 Mediated and achieved by water.'

34 And I continue to quote:

35 `Whenever women were called upon to explain what was
36 different about the barrages and the proposed bridge
37 they referred to the water in some way. It occurs to me
38 that it may well be that what the women haven't been

1 able to articulate clearly is that the problem with
2 linking Kumarangk and the mainland together by a bridge
3 is precisely that a bridge goes above the water. It is
4 a shore to shore, direct and permanent link. It would
5 make that link, unlike the barrages of the ferry cable,
6 unmediated by water. It would make the system sterile.'

7 That is all I wish to refer to you in the report of
8 Professor Saunders.

9 Could I quickly refer you to some of the topics that
10 have been ventilated in the media?

11 First of all, on 11 July 1994, in The Advertiser -
12 and I indicate to you and all those listening to this
13 tedious rendition that I don't intend to read huge slabs
14 of articles. I just draw your quick attention to where
15 topics are raised.

16 First of all, The Advertiser, at 11 July 1994,
17 reproduces that section out of Professor Saunders's
18 report which I read to you before:
19 'The Ngarrindjeri women regard the Murray Mouth area in
20 general and Hindmarsh and Mundoo islands and the
21 surrounding and separating waters as crucial for their
22 reproduction.'

23 Etc.

24 COMSR: Does that portion has some relevance to
25 the evidence that is to be led?

26 MR SMITH: It does in the sense that it just
27 canvasses that same topic about reproductive organs and
28 the like and the barrage and what effect that would
29 have.

30 Then The Advertiser of 14 July 1994 also canvasses
31 that same topic. Questions of reproduction, etc., and
32 an allegation where Dr Fergie said:
33 'My informants believe that the construction of the
34 Bridge will form a permanent link between two parts of
35 the landscape whose cosmological efficacy is contingent
36 upon ... disappear. In short, my informants believe
37 that the building of the bridge would not simply injure
38 and desecrate their tradition, they believe it has the

1 clear capacity to destroy their culture.'

2 The Advertiser at 15 July, there is again an article
3 on that same topic of reproduction and cosmological
4 efficacy.

5 In the Financial Review of 26 May 1995 there is an
6 article which features an interview with Dorothy Wilson
7 where Dorothy Wilson indicates that:

8 `The men indicated the map in the cottage at Hindmarsh
9 Island and told us that it looked like women's
10 privates.'

11 In The Sydney Morning Herald of 27 May 1995 there
12 occurs an article which canvasses again the topic and
13 makes the point that:

14 `A bridge would cripple the body and natural functioning
15 of the spiritual ancestors and cause great cultural
16 trauma to the Ngarrindjeri people.'

17 There is, in The Sydney Morning Herald, at 27 May
18 1995 also, an interview with the witness Bertha Gollan
19 where she makes the point:

20 `All this stuff about stopping fertility, they're still
21 breeding like rabbits.'

22 In the Who magazine of 17 July 1995 Doreen
23 Kartinyeri herself told the journalist that:

24 `We knew Hindmarsh Island was sacred to the older
25 people. It was sacred to them because of their
26 spiritual beliefs because the whole waters around there
27 represent the womb and all that.'

28 The Advertiser of 27 May 1995, there is just another
29 comment reported that:

30 `Some of the beliefs were based on the region's
31 geographical features. Particularly the mouth of the
32 River Murray which is separated from the island by a
33 wide channel. Others had to do with the area's
34 cosmology.'

35 Then The Advertiser of 7 June 1995, which is
36 actually Exhibit 24 already, that is the Sarah Milera
37 interview. The article reads:

38 `Mrs Milera denounced widely circulated claims that

1 Ngarrindjeri women believe the Murray Mouth, Hindmarsh
2 Island, Mundoo islands and the ... by Lakes Alexandrina
3 and Albert were sacred because they resembled female
4 genitalia.'

5 And the article also says:
6 `Mrs Milera who describes herself as a custodian of
7 traditional Aboriginal knowledge from her royal lineage
8 ... the women's business had its origins in genuine
9 belief held by female Ngarrindjeri Elders, but these
10 have been exaggerated by women from Adelaide.'

11 The Australian of 27 May again contains an article
12 which publishes, if you like, to the public information
13 about the topic of the Murray Mouth area being crucial
14 to the reproduction of the Ngarrindjeri people, etc.

15 CONTINUED

1 The `Canberra Times' of 7 June 1995 makes reference
2 to Professor Saunders' report and includes an assertion
3 that Professor Saunders concluded that it, being the
4 bridge, would damage the fertility of Aboriginal women.
5 The article in the `Australian' of 27 May also talks
6 about the barrages.

7 I think that is enough, but there are more such
8 articles, and more such material published in the print
9 media and the electronic media. For those reasons, the
10 topics which are going to be very briefly and very
11 generally ventilated in Mr Denver's evidence - and when
12 I say `ventilated' it is hardly that, because they are
13 just assertions, quick assertions on those topics that I
14 mentioned to you before - are the barrages and the
15 effect of the barrages linking the island, women's
16 anatomy, birth. As much as Mr Milera says in his taped
17 conversation with Mr Denver.

18 So my submission to you is that the evidence
19 touching on those matters which is going to be touched
20 upon in Mr Denver's evidence, does not amount to a
21 divulgence in contravention of Aboriginal tradition and,
22 therefore, does not amount to even a potential breach of
23 Section 35.

24 MR TILMOUTH: Putting aside for a moment the question
25 of the public reporting of the information that Mr Smith
26 has talked about, I would suggest that, prima facie, the
27 evidence is plainly within the purview of Section 35.
28 The mere description given and the words used is, by
29 Aboriginal tradition, privileged to Aboriginal women.

30 The argument, as I understand Mr Smith, is that the
31 fact that the matter is so widely in the public domain
32 clearly shows that it cannot, for that reason, be an
33 infringement of Section 35. There are two particulars.
34 One is we have got the Saunders report which is widely
35 available apparently, and the other one is it has been
36 widely circulated in the press across the country.

37 As to the Saunders report, I must say I was
38 surprised by the submission by Mr Meyer that it is

1 publicly available. I do not doubt what he says. I am
2 not doubting his word for a moment, but you may remember
3 some long time ago I drew to your attention some orders
4 of the Federal Court. As I understand the position, the
5 Saunders report was confidential, so to speak, for
6 strictly the use of those proceedings.

7 I cannot say, therefore, how the matter was
8 published at all, and whether it is available or not in
9 the Commonwealth bookshop, or whatever. But the fact of
10 the matter is that cannot affect the central fact that
11 the Saunders report was a discrete document prepared for
12 the sole purpose of the section 10 inquiry under the
13 Federal Act.

14 As to the wider publication in newspapers, in my
15 submission, all that they demonstrate really is that
16 various people have apparently been talking at large
17 about the matter, possibly in contravention, doubtless
18 unknowing but in contravention, of Section 35. Because
19 the subject matter of the women's beliefs about
20 Hindmarsh Island is, as I said at the start, by
21 definition, Aboriginal tradition which normally should
22 not be divulged.

23 COMSR: On what basis do you say that?

24 MR TILMOUTH: As I understand, the whole of the
25 evidence.

26 COMSR: It is the secret Aboriginal women's
27 business as distinct from women's business.

28 MR TILMOUTH: But this is what this is talking about,
29 the particulars about anatomy, barrages and so on.

30 COMSR: Are you saying that is secret, it is not
31 known, it is confidential?

32 MR TILMOUTH: No. What I am saying is, as I
33 understand the evidence, until these public utterances,
34 that was information which was exclusively privileged to
35 the Aboriginal women.

36 MR ABBOTT: What evidence?

37 MR TILMOUTH: The anthropological evidence and so on.
38 My submission is that it is not for men, still less Mr

1 Milera, to go mouthing off to the press, or to go
2 mouthing off to Mr Denver about this kind of
3 information, which is prima facie privileged traditional
4 material belonging to the women.

5 COMSR: Why is it prima facie so?

6 MR TILMOUTH: Because it is talking about the subject
7 matter, which is the sacred information of the women
8 relating to Hindmarsh Island.

9 COMSR: Don't the Terms of Reference of the
10 commission refer to that?

11 MR TILMOUTH: They do. But the fact of the matter is
12 the only way you could validly receive that material in
13 the first place is under the Section 35 delegations,
14 which have now been set aside.

15 COMSR: But haven't the Terms of Reference been
16 widely published?

17 MR TILMOUTH: They have, but the detail such as has
18 been given by Mr Smith as being widely put in the press
19 is, by subject matter, part of the specific detail of
20 privileged women's information. In my submission, it
21 simply cannot, for that reason, be disclosed even though
22 it might be in the public domain. What has been sought
23 here is to give evidence about a divulgence of that
24 information by Mr Milera to Mr Denver, which is not
25 authorised by the section.

26 COMSR: The question is: Is it prohibited by
27 the section?

28 MR TILMOUTH: It must be, by definition, directly
29 prohibited. The fact that other people have gone off
30 and told newspapers about it, cannot cure the fact that
31 what Mr Milera has apparently said to Mr Denver is in
32 breach of the section, because the subject matter is
33 Aboriginal tradition. The subject matter is, more
34 specifically, the Aboriginal tradition regarding the
35 waters around Hindmarsh Island, which is -

36 COMSR: Has there been divulgence of
37 confidential information? The question is: is there
38 some confidential information that has been divulged?

1 MR TILMOUTH: The question, of course, is
2 `confidential; but the argument is it is not
3 confidential because it is in the public domain. My
4 point is: how did it get into the public domain in the
5 first place, who divulged it, and did they divulge it
6 lawfully within the terms of Section 35? And they
7 couldn't have. Because we do know this is part of
8 Aboriginal tradition and we do know that it relates to a
9 site, namely, the waters around Hindmarsh Island and the
10 channel. The fact of the matter is that under Section
11 35 it is an imperative `must not divulge.'

12 MR SMITH: The missing link for that is the
13 secrecy.

14 MR TILMOUTH: The argument goes, it is secret with
15 respect to Hindmarsh Island but nothing else, as I noted
16 the words by Mr Smith. That necessarily relates to
17 waters around Hindmarsh Island, which is the very
18 subject matter of the privileged women's beliefs. Can I
19 add this as well, even if were it privileged, there is
20 no authority, by virtue of Aboriginal tradition, for men
21 to be talking about it. There is no authority under
22 Aboriginal law or Aboriginal tradition for Mr Milera to
23 be talking about it as a man.

24 COMSR: What is the basis of that assertion?

25 MR TILMOUTH: As I understand the evidence that has
26 been given here, which I haven't read and, as you know,
27 I haven't sat in most of the material, but as I
28 understand the basis of this very Royal Commission,
29 there are certain beliefs which are privileged to the
30 women. That general idea is not disputed. What is in
31 dispute is about Hindmarsh Island. But on any view of
32 the facts, even if it is in dispute, there is no valid
33 occasion, under Aboriginal traditional law, for men to
34 be talking about it.

35 COMSR: What traditional law?

36 MR ABBOTT: Where is the evidence?

37 MR TILMOUTH: I can't point to the page now. I don't
38 have it with me. But Mr Abbott knows it better than I

1 do. The subject matter itself is caught by the Act.

2 COMSR: But this has been widely discussed
3 throughout the community.

4 MR TILMOUTH: Yes, that is my point. How did it get
5 widely out there in the first place? People have been
6 talking into microphones, but no-one has been thinking
7 about whether they have been doing it validly under
8 Section 35.

9 Can I make one final and separate point? Mr Smith
10 has referred to a recording of a conversation. I
11 understand there is a conversation which has been
12 recorded. I do not know anything about the details, but
13 of course there are legal and illegal recordings of
14 conversations, and I think we should have more
15 particulars to show whether or not this is prima facie a
16 legal recording.

17 MR ABBOTT: What relevance would it have to you?

18 MR TILMOUTH: It has a lot of relevance. First of
19 all, in my capacity as an officer assisting the
20 commission. If it is a communication over a
21 telecommunication device, it cannot be given in evidence
22 under the Commonwealth Act.

23 MR SMITH: You have had my advice about this topic
24 of the Telecommunications Act, Commonwealth, and the
25 Listening Devices Act. It is not for Mr Tilmouth to be
26 policing functions of this inquiry in this way.

27 COMSR: Although, I do not discourage anyone
28 from offering -

29 MR TILMOUTH: All I am saying is, can't we be told how
30 this was recorded?

31 COMSR: No doubt that will be part of the
32 evidence.

33 MR TILMOUTH: It will be, but my fear is the statement
34 will be tendered, and in the statement will be the
35 evidence of the recording before any opportunity has
36 been given to argue the matter. The reason I argue it
37 is it would be quite wrong for me to allow you to
38 receive evidence which is prohibited, for example, under

1 the Commonwealth Act. If it was recorded in a proper
2 way, why don't people say so, and let us deal with
3 another problem.

4 COMSR: Perhaps because we are dealing with this
5 other matter first, the question of divulgence.

6 MR TILMOUTH: I thought I would raise it while I was
7 on my feet.

8 MR MEYER: I do not want to delay things. I have
9 already made the comment about the Saunders report and I
10 have asked Mr Palyga, my instructing solicitor, to get
11 some dates for me, because I didn't bring some of the
12 press material down with me.

13 My recollection is on about 10 July 1994 and
14 regularly, in say the fortnight or so following 10 July
15 1994, Mr Tickner, the Minister, issued a number of press
16 releases and a phrase that he used on a number of
17 occasions was 'The publicly available Saunders report'.
18 He made comments like 'I relied upon the publicly
19 available Saunders report'.

20 I do not think there can be any doubt that the
21 Saunders report is a public document, and it has got
22 nothing to do with Section 35, or any Section 35
23 releases, or how the information came about. It follows
24 from there, if you have regard to the Saunders report,
25 there is reference in there to a number of items of
26 material, starting from p.31 and going on in Exhibit 17,
27 which refers to these beliefs, more than sufficient for
28 us to be able to get on with and deal with the evidence
29 which is peripheral to it.

30 As I understand the description that has been given
31 by Mr Smith, the evidence will not go, in any
32 significant way, further than what has already been
33 alluded to in the Saunders report. If it happens to
34 appear, as we are going along, that it is going to touch
35 on that, then we can deal with it. But right now, in my
36 submission, that doesn't arise.

37 If it assists, in relation to the telephone
38 conversation, I would have thought that when we get to

1 that point in the evidence, if Mr Smith thinks it is
2 illegally obtained, he will say something, as counsel
3 assisting.

4 MR ABBOTT: In response to Mr Tilmouth, I do not
5 want to deal with all his unsubstantiated assertions,
6 but I do the last assertion he made 'We do know it is
7 part of Aboriginal tradition'. The short answer to that
8 is that, even assuming that all he claims by way of
9 assertion is part of Aboriginal tradition, the person
10 who claims to be the custodian of that material is
11 Doreen Kartinyeri. She has, on more than one occasion,
12 deployed that material in the public forum by giving
13 interviews, by making statements.

14 In our submission, for Mr Tilmouth to say this is
15 not in the public forum because it has the look of
16 Aboriginal tradition, therefore, it can only be divulged
17 by virtue of an authorisation, ignores the fact that
18 much anthropological evidence can be divulged in a way
19 that is not contrary to Aboriginal tradition, and that
20 Doreen Kartinyeri apparently sees nothing wrong, as the
21 self-appointed custodian of this material, to deploy it
22 in the public forum, apparently, in circumstances that
23 she doesn't think is contrary to Aboriginal tradition.
24 We would invite you to proceed forthwith to hear the
25 evidence.

26 COMSR: Let us assume that everyone had divulged
27 the information contrary to Aboriginal tradition, and
28 the situation now is that it is widely disseminated
29 information. The issue is: has it not already been
30 divulged and has it lost its character of
31 confidentiality?

32 MR ABBOTT: Whether that was so, that assumes that
33 the initial divulgence was in breach of Section 35.
34 In my submission, one shouldn't make that assumption,
35 and one should do what I did to Mr Tilmouth, and that
36 is, to call for the evidence. He makes these
37 assertions, and when you say 'Show us the evidence', we
38 are left with nothing.

1 There is no evidence he can point to whereby he can
2 show that what is now touted as being the Doreen
3 Kartinyeri view, is part of Aboriginal tradition and,
4 therefore, even comes within Section 35. We are looking
5 at the issue of whether or not it is fabricated. It is
6 asserted to come within Section 35.

7 MS LAYTON: May it please the commissioner, I should
8 have left earlier. The situation is that I had no idea
9 that we would be embarking at this point upon a matter
10 that raises the very issue of whether or not something
11 is Section 35. This is a very serious matter. It
12 clearly, in our submission, would probably fall within
13 Section 35. I have no instructions at this point, and I
14 wasn't anticipating that a matter would come up so
15 early.

16 What I wish to say at this point is twofold. One,
17 there would seem to be significant doubt as to whether
18 the Saunders report itself is or is not, or may or may
19 not, be subject to Section 35 for this reason. Firstly,
20 when it was published it fell within the purview of
21 section 10 or section 11 of the Commonwealth Act, to
22 which Section 35 would not apply. In other words, the
23 question of inconsistency between a Federal Act and a
24 State Act would mean that the Federal Act would prevail.

25 Therefore, the very fact that there could be the
26 existence of a Saunders report was not, in itself, in
27 conflict with Section 35. What may have happened
28 thereafter may well have infringed Section 35 in that it
29 was no longer being used in a context of having been a
30 report made pursuant to section 10 of the Commonwealth
31 Act.

32 So that is the first point that we wish to make,
33 that there may very well be an issue as to whether or
34 not Section 35 applies to the Saunders report in the
35 context in which it is sought to be used at the present
36 time, which is not related to the section 10 inquiry,
37 nor the Federal Court proceedings.

1 The second matter that we wish to raise is the whole
2 question of interpretation of Section 35. We never
3 anticipated today that there would be a great argument
4 as to what section 35 means. With counsel assisting
5 giving every assurance `No, this is not going to raise
6 Section 35', it quite clearly does. This is the very
7 issue that we were hoping to avoid by suggesting that
8 this commission adjourn.

9 This is exactly the problem that was perhaps
10 predicated best by Ms Nelson and Ms Pyke. Both of them
11 have left. We didn't, and we have heard the argument.
12 I am most concerned that this in fact does raise Section
13 35. I would seek to get instructions from the ALRM as
14 to whether they wish to be heard as to this issue and
15 the question of interpretation of Section 35 in the
16 light of this, because there are various suggestions
17 that, once it is in the public domain, section 35 does
18 not apply. We would say that is wrong.

19 CONTINUED
20

1 There has been a suggestion that once something is no
2 longer confidential, that s.35 doesn't apply. We say
3 that that is also wrong. It is also suggested that if
4 it is only, if it is not in relation to secret sacred
5 women's business, then s.35 doesn't apply. We say that
6 is also wrong.

7 What we say at this particular time is we seek to
8 have leave to obtain instructions to put submissions to
9 you with respect to this evidence when it is quite
10 clearly the subject of controversy as to whether s.35
11 applies, and that is what we seek to do.

12 COMSR: I haven't had to consider the
13 application of s.35 previously, it hasn't been an issue
14 with the authorities.

15 MS LAYTON: That the exactly right.

16 COMSR: I was apparently clothed with it. But I
17 have some problem, I must admit, as to your standing
18 before the inquiry?

19 MS LAYTON: If I can go into the standing - and I
20 haven't had to do that before.

21 COMSR: I know you haven't. I've taken the view
22 that you are here pursuant to encouragement to do so, if
23 I might put it that way, by one of the judges of the
24 Full Court. But now that you're here, you're seeking
25 to, as it were, enter into the argument in relation to a
26 specific witness rather than just put a general
27 submission to me.

28 MS LAYTON: No. It is a general submission that I
29 make, what I say is the question of s.35 which has never
30 arisen as to its accurate interpretation. If I can go
31 to the locus, and that is a concern that you expressed,
32 that are two matters that I wish to put. One is that
33 the reason that Mr Collett and myself attended this
34 morning was in response to what was predicated by
35 Debelle J, but that whole action was all related to the
36 role of ALRM in relation to the protection of Aboriginal
37 heritage and tradition, the legal rights of Aboriginal
38 people in respect of Aboriginal heritage and tradition.

1 That is what the affidavit of Sandra Saunders, which was
2 tendered in the Supreme Court, gave us the locus to then
3 put the arguments - which we did - in the Full Court as
4 to the issue of the legality or otherwise of the Royal
5 Commission, and also the question of the authorisation
6 pursuant to s.35. That gave us that standing and it was
7 not questioned.

8 COMSR: Having said that -

9 MS LAYTON: If I follow through. Then, after the
10 decision was given, that the authorisations given by the
11 Minister were not valid authorisations, the suggestion
12 was that we should come back here to say what is the
13 effect then of the invalid authorisations, and we have
14 then given our submissions. Now, this is really just a
15 flow-on from that at a slightly different tangent. That
16 is, nonetheless, absolutely related; namely, the extent
17 to which now evidence is sought to be adduced which may
18 well infringe s.35 and the whole question of the
19 interpretation of s.35.

20 Moving on from there - so, our first point as we see
21 it is a flow-on, and an unfortunate flow-on, from what
22 has happened as a result of the Full Court saying that
23 the authorisations given were invalid.

24 The second point we make is that the role that we
25 would have put forward to this Commission - and it must
26 be remembered we were given leave to represent the ALRM
27 (and that is, I think, at p.37 of the transcript) when
28 we were first here and made submissions as to the Terms
29 of Reference, et cetera, et cetera, we then chose later
30 to withdraw for reasons that we gave. But that was
31 always left on the basis that we did have a right to be
32 here. If I could illustrate what that right is.

33 COMSR: Acting for or representing a party -

34 MS LAYTON: We don't have to represent a party, in
35 our submission. What I see the role of anybody
36 appearing before this Commission is either to represent
37 a party or represent a legitimate interest. What we do
38 on behalf of the ALRM is to represent the interest of

1 ALRM, which is special. It is not an ordinary public
2 interest and it is special because it represents
3 Aboriginal people as a whole without regard to any
4 particular clan or group of Aboriginal people.

5 COMSR: But I understood you to withdraw because
6 of a conflict of interests.

7 MS LAYTON: There were three matters, if I remind
8 you. One was a question of whether or not we were
9 acting for Aboriginal women - namely, Doreen Kartinyeri
10 and others - and we don't and we still do not. The
11 other reason we withdrew was that we said that the
12 authorisations that were given by the Minister were
13 unlawful and we could not be seen to be part of an
14 unlawful process. And the third was that we were taking
15 action in the Supreme Court with regard to the
16 lawfulness of the Commission. These are the three
17 matters we withdrew on. It wasn't just for one reason
18 or that we were acting for certain Aboriginal women,
19 such as Doreen Kartinyeri or anyone else. We don't and
20 we say we are not. What we seek to act for is
21 Aboriginal people as a whole, the legal interests of
22 Aboriginal people in having their heritage protected and
23 in this instance the interpretation of s.35 which we
24 would hope would never have to be a matter that you,
25 Madam Commissioner, would have to rule on. That should
26 be a matter that would be left to the Minister or
27 delegate - or as Mr Abbott said a court it is quite true
28 that if there is an offence committed, a court is the
29 one that would then decide. It normally wouldn't be for
30 anybody else other than the Minister or his delegate to
31 make a decision as to whether something falls within
32 s.35 and then the question of whether or not there
33 should be divulgence of material pursuant to an
34 authorisation.

35 For those reasons, we say that we wish to have our
36 submissions adjourned at this particular time to seek
37 full instructions from the ALRM as to what they wish to
38 do in the light of the fact that clearly, quite contrary

1 to counsel assisting, this is not an uncontentious
2 matter and that what is sought to be adduced on the face
3 of it appears to offend s.35.

4 MR SMITH: I raised s.35 in anticipation of Mr
5 Denver's evidence only to assure you that there were no
6 breaches. My submission is that we should get on with
7 the evidence of Mr Denver. If it's any solace to my
8 learned friend, we are unlikely at this stage to get to
9 the tape recorded interview in any event today. So, it
10 wasn't intended to be a major argument about the
11 definition of s.35, it was simply to give your Honour an
12 assurance that the topics mentioned by Mr Milera did not
13 do more than just identify the topics. So, Mam, I would
14 be proposing to call Mr Denver.

15 COMSR: We would not proceed to any evidence,
16 you say, today that in any event is the evidence which
17 you tell me does not offend s.35.

18 MR SMITH: I don't think we wouldn't reach that in
19 an hour in my submission,.

20 COMSR: I wouldn't propose that we would
21 introduce that evidence today under those circumstances
22 then, Mr Smith. I propose that we hear Mr Denver's
23 evidence, but that we don't embark at this stage upon
24 what is that portion of it which is the taped portion
25 you say.

26 MR SMITH: Yes, that is a taped portion of a
27 telephone conversation in late June.

28 COMSR: That, in itself, may require some
29 consideration I understand.

30 MR SMITH: Well, that is where the topics are
31 raised.

32 COMSR: On that basis, I am prepared to proceed
33 - and, Miss Layton, I must say that I do find that I'm
34 not clear what your status is at this Commission. I
35 will have to give that some consideration. Of course,
36 you are not asking for leave to appear, I understand?

37 MS LAYTON: Not as a party. I am asking to be heard
38 on behalf of the ALRM -

- 1 INTERJECTOR: Who are they?
- 2 MS LAYTON: They are the Aboriginal Legal Rights
3 Movement, as a body with a significant interest in
4 Aboriginal tradition which this raises.
- 5 COMSR: That may be so, whether that clarifies
6 the situation for me or not I'm not sure.
- 7 MS LAYTON: At this point, I ask for leave to - no,
8 I think the better thing is I will predicate that
9 tomorrow I will wish to address you subject to -
- 10 COMSR: Whether or not you are seeking leave?
- 11 MS LAYTON: On two things: Firstly, whether the
12 ALRM wishes to make a submission to you with regard to
13 s.35 and its interpretation, and that there would also
14 be an adjunct to that by what manner we seek to address
15 you.
- 16 COMSR: I think it has to be clarified, Miss
17 Layton. If you wish to make any further appearance
18 before the Commission, I will have to have clarified on
19 what basis you are seeking to do so. But, for the time
20 being, I propose that we proceed with the evidence of Mr
21 Denver as far as we are able without having to consider
22 any issue as to s.35.
- 23 MS LAYTON: If the Commission pleases.
- 24 MR MEYER: While Mr Denver is being found, I want
25 to correct one minor mistake. I don't want to mislead
26 the Commission. You know about my copy of the report
27 and I said the Government Printer and that should be
28 ATSIC and not the Government Printer.

- 1 MR SMITH CALLS
2 KYM DERAMORE DENVER SWORN
3 EXAMINATION BY MR SMITH
4 Q. I think that you are a farmer and you live at Denver
5 Road, Hindmarsh Island; is that correct.
6 A. That's.
7 Q. I think you have lived on Hindmarsh Island for some 35
8 years; is that so.
9 A. That's so.
10 Q. I think you have provided a statement to this
11 Commission, have you not.
12 A. Yes, I have.
13 Q. Looking at the document produced to you, and in
14 particular could you go to p.14, do you recognise that
15 as the statement that you have provided to the
16 Commission for the purposes of its inquiry.
17 A. Yes. My signature, yes.
18 Q. I think that statement alludes to a number of other
19 documents, television items and also audio taped
20 matters, doesn't it.
21 A. That's correct.
22 Q. That statement you have checked over this morning, I
23 think.
24 A. Yes.
25 Q. It's correct.
26 A. It's correct.
27 EXHIBIT 57 Statement of 30 August of Kym Deramore
28 Denver tendered by Mr Smith. Admitted.
29 Q. I think youre 38 years of age; is that correct.
30 A. Yes, that's right.
31 Q. I think you're married with two children.
32 A. Correct.
33 Q. I think you live on the island with your family and you
34 own and operate a farm there; is that so.
35 A. That's so.
36 Q. What is the size of the farm.
37 A. Yes. Under 3,000 acres, which is 23% of the total land
38 mass of the Hindmarsh Island, including Lucerne Island.

1 Q. That's L-U-C-E-R-N-E.

2 A. I guess, yes.

3 Q. You have lived on the island now for some 35 years. I
4 take it from that, that your parents were farmers on the
5 island before you; is that so.

6 A. That's correct.

7 Q. Do they still live there.

8 A. They live in Goolwa now.

9 Q. What is the size of Hindmarsh Island in totality,
10 including Lucerne Island.

11 A. 12,556 acres.

12 Q. Could you tell the Commission, you run, I think, beef
13 cattle and what else - what is the nature of your farm.

14 A. It's mainly beef cattle, but a mixed farming enterprise
15 with a bit of cropping and sheep, but mainly beef
16 cattle.

17 Q. As a farmer, do you run ecological tours on the island.

18 A. I used to before this, yes. We have a sideline to the
19 farming enterprise where we do run on-farm tours. We
20 have, as I said, almost a quarter of Hindmarsh Island,
21 including the wetlands, and the major bird populations
22 are on our place. People want to come down and see the
23 birds and a side-line to the farming we have become
24 ecological tour operators. However, this hasn't done it
25 much good.

26 Q. The bird population, has that fallen off or increased
27 over the years.

28 A. Depends whose figures you read. The bird population
29 depends a lot on the species, the time of the year. It
30 varies. Birds are not set, they come and go and things
31 vary. Last year, we had a drought and this year might
32 be a good year. The birds vary. Various publications
33 put out are all based on bird counts which are over a
34 specific period. Sometimes if you are trying to push
35 the - well, in this instance, the anti-bridge movement,
36 they select certain lines and they say that numbers are
37 down. You could select another line to push another
38 argument.

- 1 Q. In 1995, you won an award of some sort to do with the
2 ecology and environment of Hindmarsh Island; is that so.
- 3 A. Yes. In December 1994, we were awarded the Kesab Tidy
4 Town Environments Initiative Award. That was a new
5 award. They wrote - we got special mention in that
6 because we were one of very few individuals - nearly
7 every case was a school, a community group or a town and
8 we were individuals - and we were recognised for our
9 contribution towards the environment. And this year we
10 won the Regional Ibis Award. This is a Commonwealth
11 Development Bank Award.
- 12 Q. That Ibis Award is for, I think, primary producers in
13 South Australia who have done the most to encourage
14 wildlife, that is our flora and fauna, and conservation
15 of their properties as an integral part of successful
16 commercial sustainable farming; is that right.
- 17 A. That's right.
- 18 Q. Do you have any association, commercial association,
19 with the marina, a Hindmarsh Island, or the Chapman
20 family.
- 21 A. No. I have no interest in the marina. I don't even
22 know anything about the marina. I'm even as far down
23 towards the other end of the island as you can get. And
24 up until recently, I have actually naturally in the past
25 objected to things that the Chapmans were doing. I had
26 no love for the Chapmans in the past. By the same
27 token, I have no interest in seeing them fall. Now,
28 with all of this, we are both seeing the same, well -
- 29 Q. So, your position is that you are in favour of the
30 bridge; is that the case.
- 31 A. Yes, that's correct.
- 32 Q. In that sense, you are aligned with the Chapmans.
- 33 A. Very much so.
- 34 Q. In your time on Hindmarsh Island, quite apart from the
35 developments in the late '80s and into the middle of the
36 '90s, has there been a bridge mooted down on Hindmarsh
37 Island.
- 38 A. Ever since I can remember, there's been talk about a

1 bridge. And in the '60s it was planned, in the '70s it
2 was mentioned and every few years. Every time the
3 bloody ferry breaks down, it's mentioned. I can
4 remember the local council and the local economic
5 development group, or whatever it was called, at the
6 time in '87 called for a plan for the bridge - and that
7 was on the front page of the Victor Harbor Times with
8 the actual discussion and the plan, and this was two
9 years before the Chapmans came into the scene virtually.
10 As far as people today associating Chapmans with the
11 bridge, that's just a load of rubbish. I mean, the
12 Chapmans are only going to accelerate what is
13 inevitable.

14 Q. The bridge dispute has had an effect on you personally,
15 has it not.

16 A. Yes.

17 Q. And people around in the Hindmarsh Island Goolwa area.

18 A. It's polarised the communities. The people who were
19 friends before don't speak to each other any more.

20 Personally, I've had threats. I've been threatened to
21 be burnt out and been told that if I attend this

22 Commission - anonymously, of course - that don't bother
23 about coming back. I've - my wife has received

24 anonymous letters. I've had - these anti-bridge people
25 have even got so low, they've threatened my nine year

26 old daughter.

27 CONTINUED

- 1 So, rather than put me off, I think `Well, I will fix
2 the bastards. I will come out with everything I have
3 got.'
- 4 Q. I think, in the years leading up to the banning of the
5 bridge, you have attended numerous meetings, both pro
6 and anti bridge gatherings, is that the case.
- 7 A. Yes.
- 8 Q. Looking at this, I think you call it a flyer, don't you.
- 9 A. Yes.
- 10 Q. Now produced to you.
- 11 A. It is a flyer.
- 12 Q. Looking at that flyer produced to you, which is an
13 advertisement for a public meeting on the 3rd, is it.
- 14 A. 3 August, it would be 1994, I should imagine.
- 15 Q. Did you go to that meeting.
- 16 A. Yes, I did.
- 17 Q. Where was that held.
- 18 A. It was at the Old Meeting Hall, rear of Colonel Light
19 Centre, 25 Pirie Street, Adelaide.
- 20 Q. About how many people were present.
- 21 A. At a rough guess, I would say there might have been 200
22 people.
- 23 Q. How did you come to go there, was it by reason of
24 responding to the flyer.
- 25 A. Yes, I was widely publicised, I think, at the time.
- 26 Q. I don't want you to go into chapter and verse about what
27 happened at the meeting, but I think a number of
28 resolutions were put at the meeting and voted on by
29 those there, is that correct.
- 30 A. Yes, the meeting was called by The Friends of Hindmarsh
31 Island and The Conservation Council. I only went along
32 to see what the whackers were up to, really.
- 33 Q. As the owner of a large portion of Hindmarsh Island, I
34 think you were a little bit put out that you hadn't been
35 consulted, is that right.
- 36 A. Yes, I am probably unfair calling them that, but I felt,
37 if they could call a meeting of The Friends of Hindmarsh
38 Island and not ask anybody that actually lived on the

K.D. DENVER XN (MR SMITH)

1 island or owned land, if they wanted to be a friend, all
2 these so-called friends of Hindmarsh Island nearly all
3 live in the suburbs here in Adelaide and visit there on
4 the weekends. They are the ones that are ruling our
5 lives. So, I decided I would go down and find out what
6 it is that I am meant to be doing in the future.

7 EXHIBIT 58 Notice of meeting tendered by Mr Smith.

8 Admitted.

9 Q. I think you attended another meeting of that selfsame
10 organisation, did you not.

11 A. Yes, at this previous one that we just discussed, I -
12 you have mentioned they were passing resolutions and
13 things. People were voting on them. It was quite
14 obvious that I was an odd bod, because everybody was
15 voting except for me. So, I got to the stage where I
16 clarified the situation by asking a question of whoever
17 was out the front. I had a piece of A4 paper with me
18 that I had coloured in just about a quarter of the page.
19 I asked if I could speak at it and I stood up and said
20 `If that is Hindmarsh Island, I actually own that much
21 (INDICATES) and nobody has ever asked me if I wanted to
22 be a friend of Hindmarsh Island.' And I said `You are
23 rabbiting on about the wetlands, the Murray Mouth.' The
24 fact is, we own more wetlands than everybody else owns
25 wetlands put together on Hindmarsh Island. We own the
26 land around and surrounding the Murray Mouth on
27 Hindmarsh Island and they have never, ever asked me what
28 my opinion was. And yet they were laying down the rules
29 on what we should be doing. And, frankly, they just
30 bloody well didn't know. So, I felt I should have been
31 consulted. So, that is why I went to whatever you are
32 referring to next.

33 Q. Looking at the green flyer I have just handed you there,
34 that relates to a meeting on 8 October 1993, does it
35 not.

36 A. Yes, that's correct.

37 Q. Can I ask you, before we get on to that meeting, at this
38 first meeting in August 1993, were there any Aboriginal

1 communities represented at that gathering.

2 A. No, this next one lists them, but, on that flyer, they
3 are not even mentioned. There was, as far as I can
4 recall, there was no mention of it. They were sticking,
5 at that stage, to environmental issues and what have
6 you. It was only later, when they were not getting
7 anywhere with that, that they thought of something else.

8 Q. The answer to my question is that there were no
9 Aboriginal people that you noticed at that meeting of 3
10 August 1993, or were there.

11 A. Not that I saw and not that was recorded on the flyer.

12 Q. And no -

13 A. No subject to do with it.

14 Q. And no Aboriginal issues raised there.

15 A. Not that I am aware of.

16 Q. On 8 October 1993, there was another meeting that you
17 attended of this organisation, The Friends of Hindmarsh
18 Island. Where was that meeting.

19 A. The Centennial Hall, Cadell Street, Goolwa.

20 Q. And the flyer which you have in front of you advertising
21 that meeting actually makes mention of, I think, the
22 Lower Murray Aboriginal Heritage Committee, does it not.

23 A. That's correct.

24 Q. Were there people present at the meeting from that
25 committee.

26 A. From memory, I would say it was George Trevorrow and
27 Henry Rankine. There may or may not have been anybody
28 else, but that's all I can recall.

29 Q. There is a mention of the CFMEU, the Construction
30 Forestry and Mining Energy Union.

31 A. Yes.

32 Q. Was there a representative of that organisation there.

33 A. Yes, I didn't pay a great deal of attention to most of
34 the meeting that was there, because I figured they were
35 full of bull, once again. Because I figured I knew more
36 facts than what they did and they, once again, didn't
37 want to know what I had to say. We had people from
38 outside the community running around calling the shots.

K.D. DENVER XN (MR SMITH)

1 I was quite interested in this unionist, Thomason. He
2 introduced himself as being in touch with islands
3 because he came from the Shetland islands. That drew a
4 rather interesting response from most people, because
5 the guy doesn't even come from here. They shipped him
6 in from overseas, in the first place, and now he is
7 telling everybody that he is in touch with the island
8 and he is a native of the Shetland islands and he was in
9 touch with people. And I just thought 'He is full of
10 it.' And so did everybody else, I think. But he was
11 pushed to the front by these Friends of Hindmarsh
12 Island. And I really ignored most of it, because it was
13 obvious which way it was going. They were preaching to
14 their converted crowd. Anybody of any intelligence
15 wasn't there, for a start. I sidelined Thomason at the
16 end and had a chat to him.

17 Q. Tell us what was said between you.

18 A. This guy, who looked rather strange to me, with an
19 accent that was as broad as broad with an Aboriginal
20 badge on I think from memory and pushing the cause, I
21 said to him, you know, where he was - his involvement
22 was. I said, you know, 'Why, if you are from the
23 Construction Forestry and Energy Union, what were you
24 doing here pushing this?' And he said 'Well, it is my
25 position that, if the majority of the people are against
26 this bridge, which they obviously are here tonight, it
27 is up to me, as a union organiser, to see that it is
28 stopped.' And I said 'Fair enough.' I said 'If I call
29 a meeting tomorrow tonight' - and we have got 200 people
30 there - 'If I call a meeting tomorrow night and I have
31 400 people all locals to say yes, the majority of the
32 people do want the bridge and this is a staged show,
33 will you come and support my group? Because clearly
34 the majority of the the people down in Goolwa want the
35 bridge.' And he said 'God, is that right?' In the
36 meantime I think Richard Owens and Owen Barwick whizzed
37 him away in a hurry, because he had to get back into his
38 group, the group that had him down there. And they took

1 him off and wined him and dined him.

2 Q. The people in favour of the bridge, which would have
3 included you, of course, you, yourself, formed an
4 organisation of your own, did you not.

5 A. Roughly.

6 Q. There were meetings which you had in the Goolwa area,
7 were there not.

8 A. What happened was the previous Government signed a
9 contract. The Chapmans had a contract. The next
10 Government come along and said they were going to build
11 it. We were really the people who were going to be
12 there, whether the bridge happened or not. And the ones
13 - not the fly in fly out ones creating havoc. We didn't
14 have to run around rattling a can, because it was
15 promised it was going to happen. And gradually the anti
16 bridge movement got more and more momentum. And, for
17 some reason, the press managed to give them some
18 credibility, because they were doing things. And they
19 revelled in that fact. And that gradually people were
20 paying attention to these loonies. We had a former
21 labour Minister, at that stage, Barbara Wiese, who had
22 stuck her neck out and said that she is going to go
23 ahead with this bridge. At that stage, I invited her
24 down to Hindmarsh Island to see the people, the people
25 that actually live there, the people that own land
26 there. And see what their opinion was. And, well, of
27 course, it is a well known fact, it is proven, all the
28 press people know in their records, the majority of the
29 people down there do want it. There is - more people
30 turned out for one rally than in all the anti things put
31 together. The majority of the people do want it. They
32 are just sick to death of the hype. We got Barabara
33 Wiese to come down there and we supported her. And film
34 footage will show that she was at my house with
35 several of the major land owners and other interested
36 parties in on the islands. And we backed the woman and
37 said, you know, 'Even though you are copping flack,
38 stick with it.'

1 EXHIBIT 59 Flyer for meeting of 8 October 1993
2 tendered by Mr Smith. Admitted.

3 Q. Did your organisation have regular meetings.

4 A. After this - I can't remember exactly when it was, but
5 after about this stage we thought, well, they all went
6 quiet for a while, the opposition went - opponents to
7 the bridge, I should say, went quiet for a while. And
8 then they regrouped and started having their meetings
9 and gaining in momentum again. And a few of the major
10 land owners and business people around the town thought
11 'These guys are getting some credibility again.' We,
12 once again, thought there was no reason for us to be out
13 there rattling the can, because it is signed and all bar
14 waiting for the delivery of this bridge. 'There is no
15 need for us to rant and rave', but they were getting
16 credibility. And we thought 'We are going to have to do
17 something.' So, a few of us got together and met on the
18 island and said 'Look, they are getting a bit of
19 momentum up.' And I can't remember, but I think it was
20 about 17 key people from the area turned up on a Monday
21 night and we decided we had better have a meeting of
22 people that were interested in this and see what we
23 should do and perhaps play them at their own game. And
24 so we called a meeting for I think it was a Wednesday
25 night and there was probably about 80 or 90 business
26 people from the town all at this meeting. And I can't
27 remember who were the guest speakers there, but I think
28 there was a couple of people invited anyway. But
29 unfortunately at the time they needed somebody to
30 introduce them and I was pushed to the front, because
31 nobody wants that job. And I was at the front, from
32 then on, every week we had a meeting for the next six
33 months from a mixture of rallies and meetings we had
34 four and a half thousand people go through our talks -
35 admittedly sometimes it was the same people - all
36 wanting the bridge and all thinking that this whole set
37 up stinks.

38 Q. I think, at the same time, The Friends of - as they came

- 1 to be known, the Friends of Goolwa and Kumarangk, were
2 having regular meetings too, is that correct.
- 3 A. Yes, they were still having their meetings or their
4 picnics down by the ferry and they were still operating
5 as The Friends of Hindmarsh Island. And, at one of our
6 earlier meetings, we decided that 'How can these people'
7 - who most of them - and they still don't live on
8 Hindmarsh Island. Most of them still live in town -
9 'be friends of Hindmarsh Island and yet we, the people
10 who live down there, that pay the rates and taxes, that
11 have been there all the time, aren't even invited
12 to join?' Somebody checked it out and found out the
13 guys hadn't even incorporated the name and somebody came
14 up with the idea of 'Let's go and incorporate it and
15 take it away', which really peeved them.
- 16 Q. So, they became known as The friends of -
- 17 A. They changed their name to The Friends of Goolwa and
18 Kumarangk. I have been there for 35 years and, until
19 then, I had never heard of Kumarangk.
- 20 Q. Can I take you to the arrival in the area of Sarah and
21 Douglas Milera, at p.3 of your statement.
- 22 A. Yes.
- 23 Q. I think you became aware of the fact that Sarah and Doug
24 Milera came to Goolwa and Hindmarsh Island I think on 23
25 October 1993, you say.
- 26 A. Yes, I only know it was then because Doug Milera made
27 several phone calls to me after the famous Chris Kenny
28 night when the media - when he sent that letter to
29 Robert Tickner. Doug contacted me regularly after that,
30 because it was disputed, his credibility, whether he was
31 drunk and everything like that. And the guy continually
32 phoned me on a regular basis after that, to assure me
33 that he wasn't going to change his story and he wasn't
34 drunk. And I will come to that later on and the
35 different things. But in one conversation we were just
36 discussing how he got to be there, involved in the first
37 place and that is how I know it was that date. He was
38 invited by I think, at that stage, it was still called

1 the The Friends of Hindmarsh Island, to come down to
2 Emelia Park to a picnic day.

3 Q. Looking at this copy flyer produced to you, do you
4 recognise that as the flyer in respect of that picnic or
5 barbeque at Emelia Park.

6 A. Yes, it is supported by the Conservation Council,
7 Friends of Hindmarsh Island and the Aboriginal Heritage
8 Committee, CFMEU and Greenpeace.

9 Q. Did you, yourself, get a notice of that gathering.

10 A. I had people from North Queensland through to Tasmania
11 ring me up with anything they ever heard of to do with
12 anything. People - if anybody had something like this,
13 they would give it to me. I didn't go.

14 Q. You didn't go, but you knew it was on, did you.

15 A. I would have known it was on, but I still had a life, at
16 that stage, somewhere else, so, I wouldn't have bothered
17 to go.

18 EXHIBIT 60 Copy flyer tendered by Mr Smith.
19 Admitted.

20 Q. I think you came to know Dr Neale Draper also, did you
21 not.

22 A. Yes, Draper was doing a study of any - I think he was
23 supposed to be looking for anthropological sites or
24 archaeological sites on Hindmarsh Island and, due to the
25 fact, as I mentioned before, we own nearly a quarter of
26 Hindmarsh Island, eventually he had to get to me.

27 Q. Did you actually see him at work on the island.

28 A. Draper was brought out at a time when the picketers were
29 quite active, so, anybody that was wandering around the
30 island, people would ring me up and say do you know this
31 person is here, or that person is there and what they
32 are up to. Most of the time I wasn't interested. But,
33 yes, I was informed that Draper was on the island.

34 Q. I think, on one occasion, you gave him some assistance
35 for something like half a day, showing him about the
36 island, is that correct.

37 A. Yes, Draper was given a job to check out the islands for
38 sacred sites or anything of interest in regard to

K.D. DENVER XN (MR SMITH)

1 whatever his job was. Now, the fellow had - Hindmarsh
2 Island has been around over the years and, in fact, it
3 is chopped up into hobby farms. You could go down there
4 today and you wouldn't know who owns what, who owns
5 which parcels of the land, where it starts, where it
6 finishes. So, Draper would have lost most of his day
7 trying to work out who owned it to get permission to go
8 there, or, if he went on using whatever powers he had to
9 inform them that he was there. Draper contacted me with
10 regard to looking at my place and he was going to bring
11 the Aboriginals who were with him and check out my place
12 and that was coming up. What happened in the meantime
13 was I think we had Christobel Shamrat and Senator John
14 Coulter were invited down to Goolwa by the anti bridge
15 movement. And Doug Milera was there on the day and they
16 were ranting and raving about why there should be no
17 bridge. And there was one person from the other side
18 that was ranting and raving about why there should be a
19 bridge.
20 CONTINUED

K.D. DENVEN XN (MR SMITH)

1 That person just happened to be my father. So when
2 Draper rang me up, he decided it might be a good idea if
3 just he and I met, because obviously Milera and the
4 Aboriginals had just had a run-in with my father, he
5 thought there would be some association, and he thought
6 it would be better if we just met together. I said 'I
7 don't have a problem with that, you just turn up
8 whenever you like', and he did. Draper, because, as I
9 said earlier, there was so many parcels of land on
10 Hindmarsh Island, indicated that he was getting a long
11 way behind. I said to Draper 'We have to get this done.
12 You have to get this done. It is not in my interests to
13 delay things. If we work together rather than work
14 against each other it will all be over and done with and
15 that's it'. I agreed to take Draper rather than let him
16 wander willy-nilly. As I indicated earlier, we run our
17 farm fairly strictly to look after it. So we don't have
18 foreign vehicles driving around because of the spread of
19 noxious weeds and what have you. So I took him in my
20 vehicle, and we checked out the whole farm. Most of our
21 land - we have got a lot of wetlands, we have a lot of
22 flat ground and we have -

23 COMSR: I am just wondering how much of this is
24 necessary?

25 XN

26 Q. We don't want you to go into chapter and verse about
27 locations of sites and things like that.

28 A. I helped Draper. Draper said I saved him six weeks.
29 Instead of going to every 80 acres, I managed to show
30 him 30 sections in three hours, and pointed out what was
31 relevant.

32 Q. And he was very grateful to you.

33 A. Yes.

34 Q. Can I take you to Professor Cheryl Saunders. You did
35 speak to her when she was down at Goolwa, didn't you.

36 A. Yes.

37 Q. That was in June 1994, is that right. Thereabouts.

38 A. Thereabouts.

1 Q. I think that was the occasion that you first spoke to
2 Douglas Milera, is that right.

3 A. Yes.

4 Q. How did that come about, that you spoke to Milera.

5 A. I was waiting to speak to Cheryl Saunders. She had just
6 finished with a large group of anti-bridge people. I
7 mean, there was a whole room full of them at the time,
8 so she saw them en masse rather than individually. I
9 was waiting to see Professor Saunders, and Doug came out
10 of a side door. I knew who he was, but we hadn't
11 spoken. I mentioned the fact that Draper had been
12 there. We had one major site that was on a boundary.
13 One side is totally rehabilitated and revegetated, the
14 other side is a complete mess with artefacts and stuff.
15 Draper commended us for our work, what we had done. I
16 mentioned to Doug 'If he wants to come, I haven't got
17 any problem with any run-in he has had. If he wants to
18 come and check it out for himself, feel free'. We just
19 had a discussion. He said 'Thanks very much. I have
20 heard what you have done and it sounds terrific'. And
21 that was the end of our conversation.

22 Q. You then went ahead with your meeting with Professor
23 Saunders, is that right.

24 A. That's correct.

25 Q. I think you told Professor Saunders about an Aboriginal
26 man who preferred to row around the island rather than
27 travel across it. Is that right.

28 A. That's right, yes.

29 Q. Could you tell us what you said about that.

30 A. I found Professor Saunders very fair. She gave me two
31 hours of her time, when she was stuck for time. She was
32 obviously flat out. During this time I told her so many
33 things that I thought would be relevant, and why we
34 should have the bridge, and I thought 'She is obviously
35 going to come out on our side'. The only thing she used
36 out of two hours was a little bit of rot that she got
37 wrong, and this was to do with an Aboriginal gentleman
38 earlier in the century, who chose to load his bicycle

K.D. DENVEN XN (MR SMITH)

1 onto a boat and row around Hindmarsh Island to get to
2 Goolwa from down the lakes end rather than come across
3 it. In the Saunders report, which is -

4 Q. Perhaps don't worry about what was in the Saunders
5 report. What did you tell her about that story.

6 A. What I told her was that the guy chose to row around it.
7 Am I allowed to say what she said?

8 Q. Don't worry about what she put in her report. Tell us
9 what you told her about this guy and his bicycle.

10 A. I told her that the guy loaded the bicycle onto the boat
11 rather than come across Hindmarsh Island, and the reason
12 why the guy loaded his bicycle onto the boat was, at the
13 turn of the century, Hindmarsh Island was covered in
14 African box thorns, which is a thorn bush, and sand
15 tracks and sand dunes. To ride a bicycle across
16 sandhills with punctures isn't the way to go. This is
17 what I wanted, but was interpreted as something else,
18 and that's in the -

19 Q. You told her that that was the reason why he rowed
20 around the island, is that right.

21 A. Well, that's the reason why he rowed around the island,
22 but -

23 Q. Why he rowed around the island.

24 A. He rowed the bicycle instead of riding the bicycle.

25 Q. We are at the bottom of p.4 of your statement there. On
26 12 March 1995, there was a large rally in Goolwa, where
27 you met and spoke with Douglas Milera again. Is that
28 right.

29 A. Yes. We had another rally to indicate support to prove
30 that the majority of the local people in fact want this
31 bridge. We had - this time we didn't have much in the
32 way of guest speakers. Politicians tend to get very shy
33 of that. They are not going to win something.

34 COMSR

35 Q. The commission is not really concerned with issues about
36 whether the bridge should be built or not. You
37 understand that. We have got nothing to do with that
38 question. I note that you have a pre-occupation with

1 it, but you will understand that the commission is not
2 concerned with that issue at all.

3 A. Okay.

4 XN

5 Q. The large rally, can you tell us about that.

6 A. The rally was in support of the bridge.

7 Q. I don't think the commissioner means that you can't
8 speak about the bridge again.

9 COMSR

10 Q. You can speak about it, but it is not an issue before
11 the commission. I just wanted you to understand that.

12 A. Anyway, the reason I was there was for the bridge, the
13 rally, and I was, once again, still in front. I was
14 more or less like an MC at the time. I briefed the
15 crowd on what was going on, and then I walked down the
16 street in front of them. So when we came to a policeman
17 who was blocking off the street, I just said to them 'Do
18 the right thing. We are the good guys in all of this'.
19 As we were going past the post office, Doug Milera was
20 on the steps of the post office, and by then I had
21 almost lost my voice from telling people 'You should be
22 yelling now, you should be quiet now', or whatever. I
23 just walked over and said 'Goodday, Doug. Do you want
24 to come and join us?' Just tongue in cheek, and
25 whatever I said in here. I think he just - XN.

26 Q. He declined to join your rally.

27 A. Yes. Had a bit of a laugh and said 'No thanks, I'll
28 give it a bit of a miss'.

29 Q. I think on another occasion you saw him it was down near
30 Signal Point in company with Colin James, the journalist.
31 Is that right.

32 A. That's correct. I was going into Signal Point to a
33 tourism function and Colin James was coming out with
34 Sarah Milera, and I thought - at that stage I'd been
35 involved in a tourist thing with Colin James, and I
36 thought he was there to see me and he had Sarah, so we
37 just ran into each other. Both Sarah and I joked about

K.D. DENVEN XN (MR SMITH)

1 the fact that we're both going to be very old before
2 this is sorted out the way things are going.

3 Q. Right up until this time, and we are in March 1995, was
4 the unpleasantness caused by the dispute over the bridge
5 still persisting in the sense of the discomfort to your
6 personal life and to friends of yours.

7 A. Yes. During this time I constantly received a lot of
8 abuse, inuendo towards my involvement, trying to link me
9 with any sort of sleazy thing that ever happened in the
10 district, more phone calls and the like, to the extent
11 where my business suffered, my health suffered, and I
12 think I had two visits to the hospital. But I'm still
13 here.

14 Q. I think in the following year, after the bridge had
15 been, in effect, banned, you started to have quite
16 regular contact with Douglas Milera, didn't you.

17 A. Only on the telephone.

18 Q. I think the first such contact was on 5 June 1995, is
19 that right.

20 A. Yes.

21 Q. I will show you some records. Do you, at your home,
22 keep a message book of telephone calls.

23 A. Yes.

24 Q. Looking at this, is that the message book that was
25 current around about the middle of 1995.

26 A. That's correct.

27 Q. If someone rings in to you, more often than not you
28 record it on your message pad. Is that correct.

29 A. Yes. It is one of these pre-ruled up ones. So if it is
30 my daughter or my wife, or whoever, they can tick off
31 the time and who it is and how to get back to them.

32 Q. Tell us what happened. I think you are assisting your
33 memory by looking at your message pad there, aren't you.

34 A. That's correct.

35 Q. Tell us what happened then on 5 June 1995.

36 A. At approximately 1.40 p.m. I had a phone call from my
37 mother to say that a gentleman had been trying to ring
38 me - had rung her, seemed clearly agitated, and wanted

K.D. DENVEN XN (MR SMITH)

1 me to ring him back immediately. So I thought 'Why
2 didn't he ring me himself?' Because he could have
3 contacted me if he wanted me. Anyway, so I phoned. It
4 was a Goolwa number, and it was Doug Milera on the other
5 end.

6 Q. Did you receive that call on a mobile phone or at your
7 home.

8 A. My mother rang me. I can't recall how she contacted me,
9 but I got the message and I rang Doug Milera.

10 Q. You recorded that fact in your telephone message book.

11 A. Yes. Doug was clearly agitated when I spoke to him,
12 too. He said that he wanted to meet with me. His wife,
13 Sarah, was currently out of the house or out of the
14 town, and while she was away he wanted to meet with me.
15 This phone call took place about two days before the
16 inspection of the Ibis awards. The last thing I wanted
17 was to be interfered with by anybody on anything at that
18 stage. But Doug insisted that he had to see me, he had
19 to see me immediately. I tried to pump him for
20 information, 'What is it you want me about?' All he
21 said was 'It would be well worth your while. I'm going
22 to give you all the facts about this whole fiasco. Can
23 you come and meet me.'

24 Q. Did you make arrangements with him.

25 A. Yes. It was - as I said, it was 1.40, so it was
26 possibly a bit later by the time our conversation
27 finished. Due to the fact that we have no bridge and we
28 have to get off the island, it takes a while. I'm as
29 far away on the other end of the island as you can get.
30 I had to finish a few things up first, so I agreed to
31 meet him at half past 2 in Goolwa at the corner of
32 Ferguson and Beach Roads in Goolwa. As I said, I had no
33 idea what he was on about, and I had no idea of - as far
34 as I was concerned, he was on the enemy camp, and I
35 wondered why this bloke wanted to talk to me. I took
36 the precaution of writing down on a notepad who the call
37 was from, what the number was, where I was going, where

K.D. DENVEN XN (MR SMITH)

1 I was meeting him, and just stuck it on the middle of
2 the kitchen table as I left.

3 Q. And you have stuck that into your telephone message pad.

4 A. Yes. When I got home I stuck it on there. As I was
5 leaving the farm, about a mile down the road, my father
6 was coming the other way. I stopped and said 'Look, I'm
7 going - ' you know, we were trying to do something on
8 the farm, and I was leaving, so it just meant
9 everybody's day was ruined. I said 'I have to go and
10 meet this guy. It must be something important. It is
11 Doug Milera. I'm meeting him' and told him where and
12 when. I said 'If I don't come back, you know where to
13 start looking'.

14 Q. So you proceeded then to the rendezvous point which was
15 - what was it, the corner -

16 A. The corner of Beach Road and Ferguson in Goolwa. I have
17 got friends that live near there, and I automatically
18 went to the wrong end. I went to Gulfview
19 Road/Ferguson, and just waited there for Doug. He said
20 he would be in the bushes there somewhere. I waited
21 there, and I thought 'Oh God, it is the other end'. So
22 I drove down to the Beach Road end, and there was Doug
23 behind the bushes, as he said, having a smoke.

24 Q. You invited him into your motor vehicle, I take it.

25 A. Yes. I suggested it. He hopped in there and drove down
26 Beach Road. Doug immediately freaked out and said
27 'Look, you can't go this way. Turn back'. So I turned
28 into the first street, not knowing that it was Sexton
29 Street, where the guy lived. He said 'You can't go in
30 this one either'. So I said 'Look, the next street is
31 the main road, we might as well keep going', and the
32 very next car that was coming towards us was Sarah. So
33 Doug proceeded to disappear into the upholstery as best
34 he could. At this stage, I didn't even know why I was
35 meeting him, where we were going, or what the problem
36 was. So it was entertaining.

37 Q. You say you had a conversation about that as a prelude
38 to going somewhere, I think.

K.D. DENVEN XN (MR SMITH)

- 1 A. Yes. I wanted to know what we were up to for a start.
2 He said he wanted to talk to me. 'Let's go somewhere
3 where we can talk. Let's go to the hotel or somewhere.'
4 You have got to remember it is a country town. There is
5 not just snack bars and places all over the place.
6 There is a couple of hotels and that's it. I said I
7 thought it would be best if we went somewhere - if he
8 wanted to talk to me confidentially, we should go
9 somewhere where it is neutral, where probably neither of
10 us would be known. At that stage I had been fairly high
11 profile in the town. If we wanted to be left alone
12 let's go to Middleton, and that's what happened.
- 13 Q. So you drove from Goolwa to Middleton. I think you went
14 to the Middleton Tavern, is that right.
- 15 A. That's correct.
- 16 Q. This is 5 June, which is a Monday, isn't it.
- 17 A. That's right.
- 18 Q. Were there many patrons in the Middleton Tavern at about
19 this time, 2.30.
- 20 A. There was two when we walked in.
- 21 Q. Tell us what happened when you got there and what was
22 said. As much as you can remember.
- 23 A. Out of a crowd of two, we could have any table we liked.
24 I didn't know how long this was going to go on, and I
25 was in the middle of doing something on the farm, so I
26 just ordered a squash for me, found out what he wanted,
27 and, from memory, I think he had a stubbie of Southwark
28 beer, so he did have a beer, and we took the table as
29 far away from the manager and his wife, or whoever was
30 there, and just sat right over in the corner and had a
31 chat.
- 32 Q. Did you give him any sort of warning before he started
33 talking to you about -
- 34 A. On the way over - of course, there is about a ten
35 minutes drive - I tried to get out of him what I was
36 doing there.
- 37 CONTINUED

K.D. DENVER XN (MR SMITH)

1 He said he really wanted to talk to me about the whole
2 fiasco that he knew was a load of rubbish and he knew
3 why it was a load of rubbish and wanted to talk to me
4 about it. And I thought that might be of interest to me
5 because - but he was clearly agitated about telling
6 anybody anything. And I said - well, at this stage, I
7 indicated to him `Well, if it's so much of a drama, even
8 though I want the bridge, don't tell me, it's not that
9 important'.

10 Q. You told him that, what, in the tavern.

11 A. I told him that about 20 times during the course of the
12 day.

13 Q. Why were you so sensitive.

14 A. The way he was. He was agitated. He said whatever he
15 was going to tell me would ruin his life, ruin his
16 marriage and what have you. I had seen this bridge
17 dispute do that to my life and I thought, well, it's not
18 worth it. It's got to the stage, this whole thing,
19 whether you like it or not, it's affecting people's
20 lives. And I even thought, do I want the bridge badly,
21 as has been pointed out. I didn't think it was worth
22 him getting into the same situation just for it. I took
23 the precaution of pointing it out to him that `It's not
24 worth it. Do what you want, not what you think somebody
25 else might want'.

26 Q. Did you settle down then to have a discussion over
27 drinks at the Middleton Tavern.

28 A. We sat and talked about a few things and eventually I
29 got him on the subject of why we were there.

30 Q. Before starting on the tavern, there have been
31 allegations against Mr Milera that he is a drunk, an
32 alcoholic. You're aware of those.

33 A. Yes, I've seen him.

34 Q. What was his condition when you picked him up and took
35 him to the tavern.

36 A. As far as I could tell, the guy was completely sober.
37 It was 2.30 in the afternoon in the middle of a day on
38 the workday. Most people I know don't drink unless

- 1 they're doing something. He seemed - well, he seemed
2 soberer than - as sober - seemed soberer.
- 3 Q. You were down at the tavern and you were with your
4 squash, is that right, and him with his beer.
- 5 A. Yes. My lemon squash. I'm going back to work, he is
6 having his beer and going on our ways.
- 7 Q. Tell us how the conversation started. You say in your
8 statement he talked about his beliefs as an Aborigine
9 and his beliefs as a Christian to start with. Was that
10 the first time.
- 11 A. Yes. Virtually once he settled down and we talked
12 about, you know, the general weather and the pub, or
13 whatever, I wanted to get going, get home again, and he
14 started to tell me that he has beliefs as an Aborigine,
15 he has beliefs as a Christian and he's got to decide
16 whether to use his beliefs to back up what his friends,
17 the Aborigines, are saying is stronger than his beliefs
18 as a Christian. He indicated to me that he was a
19 Christian, but not much of one, but he thought that he
20 needed to get this out for him to sleep at night, or
21 whatever his -
- 22 Q. Did he talk about, as you have said in your statement,
23 lying.
- 24 A. Yes. He indicated that he had a great deal to do with
25 the fabrication of this whole story and, at that stage,
26 it looked like the banks, or whatever, whoever they
27 were, were going to throw the Chapmans out of their
28 house. And Doug said that he was very - well, he was
29 upset about the fact that somebody could lose their
30 house over a load of crap that he had helped invent.
31 And this, during the course of a day, this came up
32 several times that he felt really upset to think that he
33 could have influenced this one way or another to the
34 Chapmans losing their house.
- 35 Q. You made the point in your statement that he perceived
36 that other people saw him as an old drunken blackfella,
37 to use his words, and that he wasn't such a person.
- 38 A. Doug gave the indication that most people presumed he

1 was a drunken blackfella. Whether he is or not, it's
2 not for me to judge. However, I've mainly come in
3 contact with Doug on the television. Now -

4 Q. I'm really not getting on that yet.

5 A. But most average, everyday white people that would come
6 across Doug, even if he was sober, would think that the
7 guy looked drunk. That's just the way that he comes
8 across. I hadn't decided for myself whether he was a
9 drunk or not, but he told me that he's considered as an
10 alcoholic. However, in the past, he has done a lot of
11 things for the Aboriginal community and he recounted
12 whatever those things are, which are written down here.

13 Q. As you have also set out there, he told you that he
14 wasn't a no-hoper and that he had written a book. That
15 he had helped to set up the Nunga's Club.

16 A. The Sobriety Group, Kalparrin and other facilities, and
17 he had done these things in the past. People had
18 forgotten about what he had done and put him down today.

19 Q. Did he, in this conversation with you, say how it was
20 that he came to be embroiled in the bridge dispute.

21 A. Yes. He mentioned, as we referred to earlier, this
22 picnic was down at Amelia Park. Said that the first
23 involvement both he and Sarah had in the bridge dispute
24 was when they were invited down to this picnic that I've
25 mentioned earlier. I now know - in conversation, he
26 indicated that he was in Adelaide at the time. He was
27 going to go to the Casino. The last thing he wanted to
28 do was to go to the picnic down there. They urged and
29 urged and urged and eventually he decided, right, we'll
30 go to the barbecue picnic at Amelia Park and then get it
31 out of the way. He said - well, when he got there, it
32 wasn't a picnic or a barbecue at all, it was
33 instructions on how to do as much as you could to
34 interrupt things without being arrested. It was more
35 like a militancy school, and he said that's not what he
36 wanted to do, and it wasn't a reason to give up going to
37 the Casino.

38 Q. None the less, you make the point that he said that he

1 became embroiled in it. Did he say how that came about
2 - I'm referring you to the bottom of p.6 of your
3 statement there.

4 A. He said that they - originally, they went along to this,
5 and then they - of course, the Aboriginal issue was
6 coming into it and they had a good - they had a good
7 point that was important for this Aboriginal issue.
8 They were both Aboriginals, so they were fated at
9 everything that came up from then on. They thought
10 `This is terrific'. And he indicated to me that both
11 Sarah and himself went along with all of this because
12 they were being wined and dined and shown around and
13 were invited to everything that ever came up. And they
14 went along with it.

15 Q. Did they say who had done that.

16 A. Yes.

17 Q. Tell us who did he say, I mean.

18 A. Well, he was naming everybody that - the individual
19 names of the people. Now, as we have indicated I've
20 always been in favour of the bridge, but I haven't taken
21 note of everybody's name and address as who are their
22 brothers and sisters. He was naming Aboriginals - of
23 which meant nothing to me. I mean, I wasn't following
24 it that closely. He named the CFMEU people and I only
25 knew of the one little guy on Shetland and I didn't want
26 to know any others. He named all of these and named a
27 lot of people by name. And I said `This is all going
28 over my head. It's not much point in telling me this'.
29 And The Friends of Goolwa and Kumarangk were also
30 involved. Well, I knew who a lot of them were, because
31 most of them have got shacks or a holiday farm of some
32 sort on the island, or visit there, or go to Amelia
33 Park.

34 Q. Doug Milera had been telling you that he and Sarah had
35 been fated by these people and treated very well. Did
36 he say whether that persisted or not.

37 A. Yes. He said that, you know, initially all these people
38 thought that they were better than sliced bread.

K.D. DENVER XN (MR SMITH)

1 Everything they wanted - they were black and were there
2 at the right time and everything was going great.
3 However, once the moment had passed and they were not
4 needed any more, they were dropped like hot potatoes and
5 going back to what it was before - and they were swept
6 along with the tide and all of a sudden they are
7 redundant.

8 Q. You make this point at the top of p.7. He puts it in
9 more colourful language. Did he say that.

10 A. Something like that, yes.

11 Q. Go on. So he got to that stage. He betrayed his
12 motivation for speaking to you. Did he then go on.

13 A. Yes. He went on and said that he wanted to tell me
14 everything. He wanted to spill his guts. He said that
15 - as he indicated, these other people didn't give a shit
16 about him any longer, that they had been used. They had
17 been used and then thrown away as far as he was
18 concerned. They got what they wanted out of them and
19 they were no longer relevant because the thing was
20 progressing well enough without them. He was extremely
21 worried about the Chapmans being thrown out of their
22 house, as I mentioned before. He mentioned it about 20
23 times. He was very worried, the fact that he had helped
24 invent all this stuff that is in the media and he said
25 'It's about time the truth came out', and so he wanted
26 to tell me everything.

27 Q. In the middle at .3 on p.7, you have made mention there
28 of what he said.

29 A. Yes. He said that the bridge should be built. He said,
30 reflecting on it, he said 'The bridge should be built'.
31 He thought that the Chapmans should be compensated. He
32 thought that I should be compensated. He thought that
33 everybody should be compensated down there for this
34 whole fiasco. He felt that the only way Goolwa and the
35 town could go ahead was if the bridge was built. Well -
36 he went on on that -

37 Q. On that tack.

38 A. Along that tack.

1 Q. Did he say anything to you at this stage about what was
2 being conveyed to him as being the down side of having
3 the bridge and development on the island, in terms of
4 the environment and the ecology of the area.

5 A. I don't think Doug was interested in the environment,
6 the ecology, or anything to do with the area, it was
7 only the Aboriginal side.

8 Q. He did make mention to you of sewage and that sort of
9 thing polluting the river; did he not.

10 A. Doug was telling me that the friends of Hindmarsh Island
11 had informed him that the Chapmans - those dreaded
12 developers - they were going to have all their raw
13 sewage pouring into the Coorong and the river, they were
14 going to have their washing up water pouring into there
15 and they were just generally bad eggs. He later on saw
16 the fact that there was an environmental impact
17 statement and he had been fed a load of crap, and that
18 these people had been leading everybody astray at all of
19 these meetings. And at each meeting they'd come up with
20 a snippet of something else to be good that would bag
21 somebody else over the issue.

22 Q. At about this stage in your conversation with him, he,
23 as you have set out there at the bottom of p.7, repeated
24 that he thought he was going to be in strife for being
25 with you, talking with you, being seen with you; is that
26 right.

27 A. That's right. He was very, very worried about the fact
28 that if he talked to me and it became public, he
29 couldn't go back. He wouldn't be able to go back to -
30 the unions wouldn't have anything to do with him and The
31 Friends of Kumarangk and he wouldn't be able to have
32 anything to do with them and Sarah - probably he'd left.
33 I picked him up and he had \$5 on him and about a half a
34 dozen cigarettes, and he was worried he wasn't going to
35 go back. He indicated to me that he was going to tell
36 all, tell the truth, and then he was on his own. So, he
37 was quite distressed about that. And, once again, I
38 assured him `Is it going to be worth it, Doug, for you

1 to do all of this?'

2 Q. This is in June of this year.

3 A. Yes. This is only two months ago.

4 Q. By that time, of course, the bridge had been banned and
5 almost a year had passed by then.

6 A. Yes.

7 Q. Did you then make arrangements, as you said at the
8 bottom of p.7, or raise with him the question of him
9 going back.

10 A. Yes. He said that he wasn't going to go back and he was
11 going to stay over at the Victor Harbor area that night
12 and he was out, no matter what.

13 Q. Then, you make it clear on p.8 that he started talking
14 to you about the unionists, naming names, et cetera.

15 A. Yes. He was naming various Aboriginals, again the
16 different unionists, and I thought `All of these names
17 would be valuable to somebody that knew what he was on
18 about, but not much chop for me'.

19 Q. Are you able to remember the names that were mentioned
20 by him.

21 A. Only very few of them.

22 COMSR: Are we concerned to go into this, the
23 detail?

24 CONTINUED

K.D. DENVER XN (MR SMITH)

- 1 MR SMITH: We don't need to worry right now, but it
2 may lead us to other things.
- 3 COMSR: I am just wondering how much of this
4 ancillary material we need to pursue in detail.
- 5 MR SMITH: No, I am not going to. We are at the
6 stage where Tom and Wendy Chapman come to the Middleton
7 Tavern.
- 8 COMSR: Are you about to go on to another topic,
9 are you?
- 10 MR SMITH: Yes.
- 11 COMSR: I note that it is 4.30 or gone 4.30,
12 that is the only reason that I bring that up, at this
13 stage.
- 14 MR SMITH: Perhaps before Mr Meyer raises a matter
15 with you: I am concerned, as counsel assisting you, that
16 we are losing an inordinate amount of time in this
17 Commission listening to people standing up and making
18 submissions about almost everything that arises. I am
19 wondering if you might contemplate perhaps ruling that
20 preliminary argument or arguments about various aspects
21 of the conduct of the Inquiry be conducted, as it were,
22 in this hearing room as in chambers earlier than the
23 starting hearing time at 10 o'clock? And I don't
24 criticise Ms Layton and Mr Collett for making the
25 submissions they do. They are perfectly entitled to do
26 that. But what is happening is that we lost a half a
27 day today, and that is a constant problem that we are
28 having. We have a new deadline to meet and, if this
29 persists, we will not have a chance of achieving that
30 deadline. So that I don't ask you to make a ruling
31 about it, now, but I make that announcement, because
32 there seems to be a free reign taken by counsel to
33 making submissions of various sorts or other in the
34 middle of the hearing time. And we are not making any
35 progress at all.
- 36 COMSR: We certainly are having a hard time
37 making much progress. Admittedly, it is a somewhat
38 complex situation we are in, but certainly we do face

1 that problem, yes.

2 MR MEYER: There is a matter I wish to raise and it
3 relates to the correspondence that we have been seeking
4 to have released that has been marked for - either
5 marked for identification or for the possession of
6 counsel assisting. From recent correspondence that we
7 have had between our office and this Royal Commission,
8 we are aware that the Commission is having difficulty in
9 securing from the Federal Minister for Aboriginal and
10 Torres Strait Islander Affairs, Mr Tickner, a copy of
11 some of the crucial documents. Namely, two letters. We
12 have already discussed here the Mouth House letter, but
13 there is also the letter of 12 May from Doreen
14 Kartinyeri to Mr Tickner, which I am aware has got some
15 important passages in it which relate to this hearing.
16 In particular, it refers to sources of women's business
17 and matters of that nature. Two of those people were
18 referred to by Professor Saunders and the other one
19 wasn't. We have now heard in this Royal Commission from
20 several witnesses that the daughter of Pinkie Mack
21 stated emphatically that there was no women's business
22 in relation to the Hindmarsh Island. That letter,
23 therefore, the letter of 12 May, and in the context of
24 the Saunders's report, raises a very proper and serious
25 submission that is absolutely germane to the issue.
26 There are other matters in the correspondence I can't go
27 into, because they haven't been canvassed yet and they
28 may have a difficulty about being relevant. As I
29 understand it, the situation as it currently stands from
30 correspondence we had with counsel assisting, the
31 Federal Minister is, in fact, frustrating this
32 Commission by stopping the production of those relevant
33 documents. There is no justification for the Minister
34 to seek to withhold them. It is outrageous, in fact,
35 that he does so. The relevant passages have been
36 canvassed in the Federal Court in public hearing and by
37 the media and there is no proper purpose which would
38 militate against what one would expect, that one

K.D. DENVER XN (MR SMITH)

- 1 Government would endeavour to co-operate with another
2 Government's inquiry.
- 3 MR TILMOUTH: Is this an application before you?
- 4 MR MEYER: Yes.
- 5 MR TILMOUTH: Or does my learned friend want to make a
6 press statement?
- 7 COMSR: It does rather sounds like that, Mr
8 Meyer. What is the point of it?
- 9 MR MEYER: What I want you to do is to take such
10 steps as are possible to you to ensure that those
11 documents are brought into this Commission and, in fact,
12 to urge the Federal Minister to co-operate in the
13 bringing of those documents so that they can be properly
14 considered in this Commission. I don't think that I can
15 ask you to do any more except that you should make some
16 public statement urging that type of co-operation.
17 That is what I ask you to do.
- 18 COMSR: I would certainly not be ready to accede
19 to that request without giving it a great deal of
20 thought.
- 21 MR MEYER: I urge your Honour to give it a great
22 deal of thought, because they are important matters to
23 this Commission.
- 24 MR SMITH: I think we have another threatened
25 submission from the ALRM tomorrow, do we not?
- 26 COMSR: Yes, we have submissions. This is
27 probably a good illustration of the problem we face.
- 28 MR ABBOTT: It was definitely a 9.30 matter we just
29 heard.
- 30 MR MEYER: That is why I waited until the end of
31 the evidence.
- 32 MR SMITH: Yes, we are in your hands as to whether
33 you want to really convene these arguments at 9.30.
- 34 COMSR: Yes, I think it would be better that, if
35 counsel propose to make applications of that sort, that
36 they advise counsel assisting and then time can be set
37 aside outside the hearing time, because the hearing time
38 is being eroded by a constant series of applications of

- 1 this sort and it is still a term of the Terms of
2 Reference that the Commission deal with the matter
3 speedily. And that is proving to be a very difficult.
4 Objective to achieve.
- 5 MR SMITH: The media just tell me - ask me whether
6 or not they will be excluded, because I did mention `in
7 chambers'. There is really no reason for it to be in
8 chambers, if they are going to be open submissions.
9 Will you adjourn to 9.30 and not necessarily term it
10 as a hearing as in chambers? It doesn't need to be, I
11 would submit.
- 12 COMSR: Yes, I can adjourn until 9.30, but I am
13 not too sure who has an application before me at 9.30.
- 14 MR SMITH: I will contact those that are
15 threatening to make submissions and perhaps let
16 everybody know if indeed that is going to happen.
- 17 MR MEYER: If not, we can proceed with the
18 evidence.
- 19 MR SMITH: If no-one wants to appear and make
20 submissions, we can just stick to the ordinary time of
21 10 o'clock.
- 22 MR ABBOTT: In the unlikely event.
- 23 MR SMITH: In the unlikely event that that is the
24 case.
25 So, I undertake to notify everybody about that.
- 26 COMSR: We will adjourn the taking of evidence
27 until 10 o'clock tomorrow, but we will adjourn until
28 9.30 for any preliminary submissions that counsel may
29 wish to make.
- 30 ADJOURNED 4.40 P.M. TO THURSDAY, 31 AUGUST 1995 AT 9.30 A.M.

1 COMSR STEVENS

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5 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

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10 THURSDAY, 31 AUGUST 1995

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13 RESUMING 9.30 A.M.

14 COMSR: Are you making an application to appear
15 to represent a party?

16 MS LAYTON: I am making an application, and the
17 application I make is that the ALRM be given the right
18 to appear before this Commission to make a submission to
19 the Commission concerning the interpretation of s.35 of
20 the State Heritage Act and its effect, in general terms.
21 That is, not applying to any particular piece of
22 evidence. And we will seek the following rulings:
23 1. That we have the locus to make that submission. And
24 2. That there be an interpretation of s.35 to the
25 effect that it is broad in its reference to Aboriginal
26 tradition as defined in s.3. And, in particular, s.35
27 is not restricted to secret, sacred information, nor
28 confidential information, nor private information. And
29 that it is not excluded from operation, even if the
30 information sought to be divulged is in the public
31 domain.

32 So, those are the rulings that we seek.

33 COMSR: The first ruling you would seek is that
34 you have the locus to make the submission?

35 MS LAYTON: That's correct.

36 COMSR: Perhaps we could deal, first of all,
37 with that?

38 MS LAYTON: Yes, the basis -

- 1 MR SMITH: I think I could probably help you.
2 In the sense that this is an extension of Ms
3 Layton's argument following upon the invitation of the
4 court, providing it doesn't dominate the entire
5 morning -
- 6 COMSR: No, I don't intend it to. The hearing
7 was intended to start at 10 o'clock.
- 8 MR SMITH: So, to the extent that it is an
9 invitation you accorded to Ms Layton to address what she
10 was invited to address by the Supreme Court justices,
11 the Commission would have no objection.
- 12 MS LAYTON: Do you have a copy of the Aboriginal
13 Heritage Act?
- 14 COMSR: Yes.
- 15 MS LAYTON: I would start, first of all, with the
16 framework of the Act in which s.35 takes its place. And
17 I notice that there seems to be an element of surprise
18 about that. This is a significant argument. There
19 needs to be a background in which s.35 is looked at,
20 which means that some argument must be put as to s.35 in
21 its context and the way in which the Act and generally
22 Heritage Acts have been interpreted.
23 The Act commences with its preamble to describe it
24 as:
25 `... an Act to provide for the protection and
26 preservation of Aboriginal heritage.'
27 The interpretation section, in particular, I refer
28 to the following interpretations which are relevant:
29 First of all, Aboriginal record, which you will see,
30 if you have the same version that I do, about three
31 definitions from the bottom of p.2. And it means:
32 `A record of information that must, in accordance with
33 Aboriginal tradition, be kept secret from a person or
34 group of persons.'
35 The reason I mention that is that, when the Act
36 chooses to use secret, it uses the word `secret'. And
37 the inference that we ask you to draw is that, where it
38 does not use `secret', it is not restricted to secret

1 material.

2 On the following page is a definition of Aboriginal
3 tradition. And that is defined in very broad terms as
4 meaning:

5 `Traditions, observances, customs or beliefs of the
6 people who inhabited Australia before European
7 colonisation and includes traditions, observances,
8 customs ... from that tradition since European
9 colonisation.'

10 I move then to the definition of traditional owner,
11 which appears on p.4 of the Act. And traditional owner
12 is described - there is one definition I missed out
13 unfortunately. If I could take you back to p.2, the
14 definition of Aboriginal site. Aboriginal site means:
15 `An area of land that is of significance according to
16 Aboriginal tradition or that it is of significance to
17 Aboriginal archaeology, anthropology, or history.'

18 Firstly, you will note that it is an area of land.
19 Secondly, that it is of significance to Aboriginal
20 tradition. There is a difference between Aboriginal
21 tradition and that which is said to be archaeology,
22 anthropology or Aboriginal history.

23 Moving on to where I stopped before going back to
24 that matter, which is the definition of traditional
25 owner, that is defined as being:
26 `An Aboriginal site or object means an Aboriginal person
27 who, in accordance with Aboriginal tradition, has
28 social, economic or spiritual affiliation ... the site
29 or object.'

30 The next section I take you to is s.6, which is the
31 delegation section. And, in particular, draw your
32 attention to sub-para.2 of s.6, which indicates that the
33 Minister must, at the request of traditional owners of
34 an Aboriginal site or object, delegate the Minister's
35 powers under certain named sections. And they are s.21,
36 which you will see deals with excavation of sites.
37 S.23, dealing with damage to sites. S.29, dealing with
38 sale of objects. And also s.35, which is the subject of

1 this particular submission.

2 This indicates that:

3 `The Minister must, at the request of traditional
4 owners, delegate his powers, also under s.35, to the
5 traditional owners of a site or object.'

6 And then there are, in sub-s.3, the manner in which
7 that can be done.

8 Sub-s.4 also says that:

9 `The Minister must not revoke a delegation, under
10 sub-s.2, without the consent of the traditional owners.'

11 The reason I mention this particular sub-section is
12 that it indicates the empowerment that is given to
13 Aboriginal people with respect to their heritage and
14 tradition, such that the Minister, who normally would be
15 the person who would be the keeper of all powers under
16 this Act, must delegate that particular power, if
17 requested to do so. This is an indication of the extent
18 to which protection is to be offered, by virtue of the
19 Act.

20 S.13 deals with the requirement that:

21 `The Minister must consult on determinations,
22 authorisations and regulations and that he must consult
23 before making a determination under the Act or before
24 giving any authorisation, or before a site or object is
25 declared by regulation to be an Aboriginal site or
26 object. And then take all reasonable steps.'

27 Stopping there, this is, again, an indication that
28 the Minister cannot just make authorisations and
29 determinations, in his own right, without consulting
30 with the Aboriginal community. And that is said to be:
31 `The committee, which is the Aboriginal Heritage
32 Committee, any Aboriginal organisation that, in the
33 opinion of the Minister, has a particular interest.'

34 And certainly the Aboriginal Legal Rights Movement
35 Was one of those bodies.

36 Sub-s.(f):

37 `Any traditional owners and other Aboriginal persons
38 who, in the opinion of the Minister, have a particular

1 interest in the matter.'

2 So, again, an emphasis on Aboriginal people being
3 able to protect Aboriginal tradition and heritage.

4 Sub-s.2 says that:

5 `When determining whether an area of land is an
6 Aboriginal site or an object is an Aboriginal object,
7 the Minister must ... '

8 I underscore `must':

9 `... accept the views the traditional owners of the
10 land or object on the question of whether the land or
11 object is of significance, according to Aboriginal
12 tradition.'

13 In other words, once there is a traditional owner
14 - and traditional owner is very broadly described as
15 somebody having affiliation, spiritual, social or
16 economic with an area - that:

17 `The Minister must accept the views of the traditional
18 owners on whether or not the particular site is of
19 significance, according to Aboriginal tradition.'

20 Again, it is leaving the decision process to
21 Aboriginal people and that the Minister must accept
22 those views.

23 The next section I come to is s.23 of the Act, which
24 deals with damage to sites, objects or remains. And it
25 says that:

26 `A person must not, without the authority of the
27 Minister, damage, disturb or interfere with any
28 Aboriginal site.'

29 And then it goes on. And there are certain
30 penalties.

31 That can be described as a blanket protection. In
32 other words, there cannot be any damage, disturbance or
33 interference with an Aboriginal site, which is an area
34 of land of significance to Aboriginal people. And, even
35 if it is inadvertent, it would still amount to an
36 offence. What penalty flows from that, is another
37 thing, but it is a blanket protection against any piece
38 of land in respect of which it is regarded as being an

1 Aboriginal site within the meaning of Aboriginal
2 tradition.

3 And, going back to the section that says:
4 `When determining whether an area of land is an
5 Aboriginal site, the Minister must accept the views of
6 traditional owners.'

7 Again, it is for Aboriginal people to nominate, in
8 fact, whether or not there is damage, disturbance or
9 interference with an Aboriginal site.

10 S.31 and s.32 I just draw to your attention, because
11 they are specific sections which deal with Aboriginal
12 records and that being the section which refers, in
13 particular, to secret matters.

14 S.35 - and I will come back to this section, but I
15 am just putting them in their context first - is dealing
16 specifically with the divulgence of information contrary
17 to Aboriginal tradition. And I will come back to the
18 exact wording, shortly.

19 S.37 is important in that it provides that:
20 `Nothing in this Act prevents Aboriginal people from
21 doing anything in relation to Aboriginal sites, objects
22 or remains, in accordance with Aboriginal tradition.'

23 And, again, it lies within Aboriginal people to
24 decide what is or should not be done, from their
25 perspective, on sites, objects or remains.

26 S.45 of the Act deals with prosecutions and s.45 (1)
27 relates to prosecutions for an offence under this Act.

28 And then you will see, under sub-ss.(a), (b) and
29 (c), that there are certain provisions made with regard
30 to Maralinga, Pitjantjatjara and the Aboriginal Lands
31 Trust. And, in effect, those particular sub-sections
32 mean that there can be no prosecution for an offence
33 unless it is firstly authorised by the Minister, but it
34 has got to be with the approval of a particular
35 Aboriginal group that are named there. And, again,
36 indicating that the control, the empowerment with regard
37 to these sections, are with Aboriginal people.

38 Those three sub-sections would not apply to

1 Ngarrindjeri people. I just point it out as giving an
2 indication of empowerment to Aboriginal people.

3 Sub-s.3 provides that:

4 `The traditional owners of an Aboriginal site or ...
5 under this Act in relation to that site or object and
6 the Minister must give proper consideration to that
7 request.'

8 In other words, for all other persons, other than
9 those described in (a), (b), and (c), there is an
10 empowerment again for traditional owners, as described
11 in the Act, to request the Minister to commence a
12 prosecution. And, instead of just leaving that to the
13 overall discretion of the Minister, there is a
14 curtailment, namely, that the Minister must give proper
15 consideration to it. Certainly the discretion in the
16 overall lies with the Minister, but, nonetheless, there
17 is a demand that he give proper consideration to the
18 request made by traditional owners.

19 I now wish to refer to the second reading speech in
20 relation to the Act. And I don't have copies for
21 everybody. Unfortunately, the time limit has not
22 enabled me to do this, with the degree of care that one
23 would normally make copies available for everyone. I
24 have a copy available for counsel assisting. I have one
25 spare copy that I can pass down here and certainly one
26 for you, Commissioner.

27 CONTINUED

1 I apologise for the underlining. Unfortunately it is my
2 only copy.

3 COMSR: That may be of assistance in directing
4 my attention.

5 MS LAYTON: It will, as it turns out. This is the
6 second reading speech of the Honourable Member Mr
7 Crafter, who was then the Minister for Aboriginal
8 Affairs. Starting off at p.1,235 of the hansard report
9 of 15 October 1987 Mr Crafter says:

10 `The aim of this bill is to provide for the effective
11 protection of Aboriginal heritage in South Australia.'

12 I will not read the rest of that passage because it
13 is referring to the fact that there were inadequacies
14 under the previous Act. He continues on, approximately
15 halfway through the second paragraph, to say:

16 `It gives no protection at all to sites of significance
17 to Aboriginal people, which are natural features of the
18 landscape, unless formally declared to be a prohibited
19 area or an historic reserve.'

20 This is the old Act. It continues:

21 `Nor does it allow sufficient input for Aboriginal
22 people'.

23 Stopping there, you will see that what he is saying
24 later is that this Act is meant to redress that
25 difficulty, namely, that you don't have to have a
26 recognition of a prohibited area or historic reserve.
27 There is a blanket approval.

28 Moving on then to the third paragraph, he mentions
29 various matters about the proclamation of the new Act,
30 then he refers to an extensive program of consultation
31 with Aboriginal communities which has then given rise to
32 the Act. Then there is a heading `Definition of Sites
33 and Objects' and he says:

34 `This bill provides blanket protection to all sites and
35 objects of significance to Aboriginal heritage. It
36 offsets this by providing for ministerial exemptions in
37 certain areas where certain activities are justified.

38 The alternative approach to this is to provide strong

1 but selective protection to particularly the important
2 sites or objects. Whilst superficially attractive, this
3 latter selective approach is all but impractical because
4 of the huge number of sites and objects throughout the
5 State. It would be enormously expensive and time
6 consuming to try and identify, document and register,
7 for protective purposes, all important sites and
8 objects. Significant sites and objects would
9 undoubtedly be destroyed or damaged through the course
10 of this exercise simply because they have not, up to
11 that point, been identified and registered. The
12 provision of blanket protection to all sites and
13 objects of significance avoids this difficulty. Whilst
14 acknowledging the fact that not all sites and objects
15 want ongoing protection, regulations will be able to
16 provide the particular sites or objects or classes of
17 sites or objects come within or are excluded from the
18 definitions of Aboriginal site and Aboriginal object for
19 the purposes of the bill'.

20 If I could stop there. There is a section which
21 says that the Minister may determine that something is
22 not an Aboriginal site. So there is a section within
23 the Act which deals with that. If I can move down now
24 to the heading 'Aboriginal Tradition' in that second
25 reading speech. The Minister says:

26 'A proportion - '

27 And I under score that word:

28 'of information relating to Aboriginal heritage is
29 sacred or secret, and its dissemination would be
30 contrary to Aboriginal tradition. As a result, it is
31 an offence under the bill to divulge information about
32 any - '

33 He doesn't go back to the word 'secret' or 'sacred':
34 'Aboriginal site, object or remains or about Aboriginal
35 tradition contrary to Aboriginal tradition. Futhermore,
36 access to information contained in the archives and on
37 the register will generally be subject to the approval
38 of traditional owners.'

1 Then he continues under 'Consultation'. He refers
2 to the Aboriginal Heritage Committee, which has an
3 important role, being comprised entirely of Aboriginal
4 people. Then he continues on to say:
5 'This is in accordance with the wishes of Aboriginal
6 people, who made it clear during the bill's development
7 that they wanted to have a major input into decisions on
8 preserving their heritage. They wish this input to be
9 at a local level, but saw value in co-ordinating a
10 central committee to consider matters of state wide
11 significance. Subsequently, the bill provides that the
12 Minister must, before contemplating certain action under
13 the legislation, consult with Aboriginal tradition only
14 for the site or object, as well as any relevant
15 Aboriginal organisation and the Aboriginal Heritage
16 Committee.'

17 He goes on to say:
18 'The Minister and/or the committee may also seek advice
19 from other people, government archaeologists,
20 anthropologists and historians, will co-ordinate on
21 advice on the scientific or historical significance of
22 sites and objects, since in some cases these may not be
23 of interest to Aboriginal people'.

24 Stopping there, the two points that I make from that
25 is that one is the consultation with traditional owners
26 about Aboriginal heritage and tradition. The second is
27 seeking the advice of archaeologists and anthropologists
28 regarding scientific or historical significance which is
29 seen to be different.

30 I also refer, and it doesn't take the argument or
31 the debate any further on the interpretation, to p.1,239
32 of Hansard, which does refer to clause 35, but it does
33 no more than restate the clause in a different form.

34 COMSR: Are we getting to clause 35 now?

35 MS LAYTON: Yes. I do not wish to prolong this, but
36 it is such an important argument. This is what this
37 commission is about.

38 COMSR: I appreciate that. I understand the

1 points you are making. That the section has to be
2 looked at in the context of the Act, and having regard
3 to the speech in which it was introduced.

4 MS LAYTON: Absolutely. The other matter I draw
5 your attention to, while I have the Hansard, is p.1,426
6 where Jennifer Cashmore, who was opposed to the bill on
7 behalf of the government, indicated that the bill in
8 fact didn't go far enough. It was still leaving to the
9 Minister far more powers, instead of giving them to
10 Aboriginal tradition.

11 Coming now to Section 35, the section is very
12 broadly worded. It says 'Except as authorised or
13 required by the Act'. There are various sections
14 regarding authorisation. It says 'A person must not, in
15 contravention of Aboriginal tradition, divulge
16 information.' Pausing there, Aboriginal tradition goes
17 back to the definition, it is extremely broad. It does
18 not talk about 'secret/ sacred', it doesn't talk about
19 confidential, it doesn't talk about private, and it
20 doesn't talk about that which is in the public domain.
21 It refers solely to the interpretation of Aboriginal
22 tradition.

23 Then it refers to divulging information relating to
24 an Aboriginal site, object or remains in sub-s.(a).
25 Again, those go back to the definition sections, which
26 are again extraordinarily broad, which means an area of
27 land of significance according to Aboriginal tradition.
28 So one goes back again to the very broad definition of
29 Aboriginal tradition which includes, of course, beliefs.

30 There is a separate subsection with regard to
31 Aboriginal tradition. I might say that that may not
32 separately often have work to do of its own in that most
33 - and it is certainly the case in this case - Aboriginal
34 tradition is related to an area of land. Again,
35 Aboriginal tradition in the broad definition without any
36 restriction.

37 It says, further, that such information may be
38 divulged only with the authority of the Minister. So

1 the points I make from that is its broadness, it's
2 unrestrictedness, the blanket nature of the section, it
3 not being limited in the way that I have just mentioned,
4 and we would submit that the whole context of the Act
5 suggests that the Minister is the one who eventually is
6 an arbiter of that which should or should not be
7 divulged, but that clearly he must consult with various
8 persons before there can be a divulgence. So it is left
9 to Aboriginal persons to say what or what not is
10 Aboriginal site or object or a tradition, and, in
11 particular, the manner in which it may or may not be
12 divulged in contravention of Aboriginal tradition.

13 In support of that, there is a further document that
14 I hand up. It doesn't have the same status as the
15 second reading speech, but nonetheless it may indicate
16 the practical way in which this has been interpreted in
17 practice. I hand a copy of what is called 'A Guide to
18 the South Australian Aboriginal Heritage Act', put out
19 in June 1989 by the Aboriginal Heritage Branch,
20 Department of Environment and Planning, which will give
21 you an understanding of the way this has been
22 interpreted in practice. Again, I have a few copies
23 available.

24 If I could first of all take you to p.11 of that
25 document. Paragraph 8 refers to protection of
26 Aboriginal sites, objects and remains and I ask you to
27 read that chapter. I just wish to highlight certain
28 passages of it at this point. The first paragraph on
29 that page says:
30 'Under the terms of the Heritage Act, protection is
31 given to four basic categories of Aboriginal heritage.
32 The first consists of sites.'
33 And they are described. It goes on to say:
34 'As defined by Aboriginal people in some form of
35 traditional custodial relationship or related affinity
36 with that place, or as recorded in anthropological or
37 historical records, or of scientific or historical
38 significance (of significance to Aboriginal archaeology,

1 anthropology or history). Questions of scientific and
2 historical significance are determined by the Aboriginal
3 Heritage Branch under delegation from the Minister,
4 based on the assessments of the branch anthropologist,
5 archaeologist or historian, or the information provided
6 by consultants in these fields and consultations with
7 those Aboriginal people who have an interest in the
8 matter. Aboriginal objects are defined and assessed in
9 the same way. The basic rule is that questions of
10 significance, according to Aboriginal tradition are
11 decided by appropriate Aboriginal people. Either
12 traditional owners or an Aboriginal organisation.
13 Questions of anthropological, archaeological or
14 historical significance are decided by the Aboriginal
15 Heritage Branch, in consultation with Aboriginal people.
16 It is the responsibility of the Aboriginal Heritage
17 Branch to identify and ensure that the appropriate
18 Aboriginal people are consulted in each case.'

19 Then I move on to p.15, para.9, 'Protection of
20 Aboriginal Tradition'. It refers to:
21 'Division 5 is concerned with the protection of
22 traditions. Section 35 makes it an offence to divulge
23 information relating to an Aboriginal site, object or
24 remains, or Aboriginal tradition in contravention of
25 Aboriginal tradition. The exceptions on this
26 requirement are situations where the divulging of such
27 information occurs under an authorisation or as required
28 by this Act. If a person is in doubt whether revealing
29 information about an Aboriginal site, object remains or
30 tradition to another person, or in a publication, might
31 be a breach of Aboriginal tradition, and an offence
32 under this section, then that person should seek
33 authorisation from the traditional owners responsible,
34 or from the Minister. If there is any doubt at all
35 concerning the identity of the appropriate Aboriginal
36 people to consult, then the inquiry certainly should be
37 made to the Aboriginal Heritage Branch, whose
38 responsibility it is to identify and consult the

1 appropriate traditional owners or local organisation.'

2 Then it goes on to say that section 35 should not be
3 confused with section 10. Both sections are concerned
4 with confidentiality of information. Then goes it
5 refer to those differences. On the following page it
6 says:

7 `Section 35, on the other hand, deals with the
8 protection of Aboriginal tradition to prevent the
9 dissemination or publication of information which,
10 according to Aboriginal tradition, should be restricted
11 knowledge. The form of information concerned might be
12 verbal, written, photographic, electronically stored, et
13 cetera. It is the information content which is the
14 subject of this section of the Act, regardless of the
15 medium by which the information is carried.'

16 Moving down and missing one paragraph:

17 `The Aboriginal Heritage Act is intended to reconcile
18 white Australian law and customs with Aboriginal law and
19 traditions, and to preserve the heritage of one culture
20 from being totally overwhelmed by another dominant
21 culture. However, because the Act is necessarily framed
22 according to the legal conventions of non-Aboriginal
23 culture, there needs to be a fundamental guarantee that
24 this Act will not be used to overrule Aboriginal
25 tradition in terms of Aboriginal people's actions in
26 relation to signs, objects and remains referred to in
27 the Act. Consequently section 37 states - '

28 Then the section is set out:

29 `And that that section is intended to ensure the
30 recognition of Aboriginal tradition in the Act does not
31 destroy those traditions'.

32 That really completes the pages that you have there and
33 to which I wish to refer.

34 The point that I make from that publication is that
35 that, too, is reflecting both the content of the Act and
36 also what was said at the time when the Act was passed
37 as to its intention. The intention is to largely leave
38 the issue of what is or is not Aboriginal tradition, is

1 or is not of significance to Aboriginal people, but then
2 finally leaving it to the Minister to decide, after
3 consulting with all of those relevant persons.

4 The other matter that I raise is that this is also
5 consistent with it being special measures legislation.
6 At this point, I hand up a copy of a convention against
7 elimination of discrimination which is annexed, in turn,
8 because it is ratified, pursuant to the Racial
9 Discrimination Act, which indicates that this
10 legislation is special measures and what this means.

11 If I could go to the second of those pages headed
12 Part 1, Article 1. This is the schedule which is
13 annexed to the back of the Racial Discrimination Act.
14 This is a Commonwealth Act.

15 COMSR: Does that enter into my considerations?

16 MS LAYTON: It enters into your consideration
17 because of the major point that I am making, that this
18 is resting with Aboriginal people as to what is
19 Aboriginal tradition, that this is the whole aim of what
20 the legislation is, and that this is part of the special
21 measures legislation which is done pursuant to Australia
22 being a signatory to the international convention.

23 You will see Part 1, Article 1, para.4, says:
24 `Special measures taken for the sole purpose of
25 securing adequate advancement of certain racial or
26 ethnic groups or individuals requiring such protection
27 as may be necessary in order to ensure such groups' or
28 individuals' equal enjoyment or exercise of human rights
29 and fundamental freedoms, shall not be deemed to be
30 racial discrimination provided, however, that such
31 measures do not, as a consequence, lead to a maintenance
32 of separate rights.' et cetera.

33 CONTINUED

1 The first of the pages that I have handed to you
2 refers to para.7 of the Racial Discrimination Act where
3 approval is given to that ratification, and s.8 which,
4 in turn, provides that matters which are special
5 measures shall not be deemed to be racially
6 discriminatory. This was taken up in turn by, in
7 particular, the reasoning of Chief Justice Doyle in the
8 action number 1399/95 in which he described s.35 as
9 being special measures protection.

10 Support also for the interpretation that I've just
11 put as to the importance of the Act in terms of the
12 protection to Aboriginals is also found in the case of
13 *Tickner v Bropho* (1993), 40 Fed. Court Reports, 183. In
14 particular, I refer to the following pages just briefly
15 because, of course, you do not have that before you.

16 This was an action which related to the Federal
17 Heritage Act, but the observations made, bearing in mind
18 that the Federal Heritage Act is also protective special
19 measures legislation, different from but similar in
20 purpose to the State Act, what Black CJ said as to the
21 Federal Act - and if I could stop there. The Federal
22 Act differs from the State Act in that it doesn't have
23 the blanket provisions. Under the Federal Act, there
24 has to be a declaration with a certain area. Black CJ
25 said in that case:

26 `The Act is clear in its purpose, broad in its
27 application and powerful in the provision it makes for
28 the achievement of its purposes.'

29 Further, on p.193, Black CJ, in interpreting s.10 of the
30 Federal Act, said this - and it is true in relation also
31 to the interpretation of the State Act with regard to
32 Aboriginal people. He said:

33 `That the history of the settlement of Australia by
34 people who were not Aboriginals reveals countless
35 instances in which the ... interests of Aboriginals.'
36 Then, going on to refer to the Minister's Second Reading
37 Speech in that case, he went on to say that it was
38 beneficial legislation - that, of course, is true here.

1 He says:

2 `And beneficial legislation is always interpreted in a
3 generous manner ... sought to be protected.'

4 The other passage I refer to in that same judgment
5 is at p.211, where French J, in particular, referred to
6 the importance of the preservation of human cultural
7 heritage as a public duty. He said that the cultural
8 heritage of a country extends to the language,
9 traditions, customs, stories and religions of its
10 peoples, past and present, and that the drive to
11 preserve that heritage sometimes conflicts with other
12 perceived public interest which involve its destruction
13 or impairment. He goes on to say:

14 `The Act was enacted with the express purpose of
15 preserving and ... to protect.'

16 We say that those observations - and very powerful
17 observations made by the justices in that Federal Court
18 case - are applicable to the way in which this section
19 within the context of this Act should be interpreted.

20 We say that the provision should not be read down;
21 which, in fact, it would be if it was to apply only to
22 secret sacred, confidential, private or only those
23 matters in the public domain.

24 It's the submission of ALRM that it doesn't matter
25 how many times information may be divulged. It does not
26 alter whether or not an offence has or has not been
27 committed. But, if there has been considerable
28 divulgence, it might affect whether a Minister gives an
29 authorisation, whether a Minister decides to prosecute,
30 or whether a prosecution, if it does occur, what the
31 penalty would be. But, the Act is broad and it's
32 intended to be broad.

33 It isn't unheard of that there can be divulgence of
34 material, albeit done for what is thought to be good
35 reason. A perfect example of that is in the case of
36 Foster v Mountford (1976) 14 ALR at p.71. This was a
37 case involving the anthropologist Mr Mountford. What he
38 had done was that he had conducted certain research with

1 regard to Pitjantjatjara people in 1940. I might say
2 that is not dissimilar to what the Berndts were doing
3 with their work. What happened is that it was years
4 later in 1976 at the end of his career, a work was
5 published in which various matters were described. The
6 book was, in fact, published and an action was taken to
7 prevent its publication before Muirhead J and he granted
8 an interlocutory injunction. In that particular case,
9 at p.72, Muirhead J referred to the following matters:
10 `The people were then far less sophisticated as they are
11 as a group today ... drawing.' et cetera.
12 He went on to say:
13 `Whilst there was no evidence by document or
14 conversation, indeed by recognised legal relationship,
15 of the manner which the confidence was reposed I am
16 satisfied ... not revealed before.'
17 There are many other observations, but I need not read
18 them and you, Commissioner, may look at that particular
19 report.
20 The reason I cite that is that it is not unheard of
21 that there can be beneficent reasons thought for the
22 divulgence of certain information. That was not in the
23 context of s.35. There isn't an equivalent of that in
24 the Northern Territory. It is an example of the way
25 information may come to be in the public arena which
26 would, none the less, be offensive.
27 We, therefore, submit in summary on that point that
28 Aboriginal people are regarded as being the persons who,
29 at least in the first instance, control the way in which
30 they may use their own traditional information and to
31 whom they may divulge it. They are the ones who
32 primarily say yes or no to divulgence, unless the
33 Minister then authorizes it if they say no.
34 The usual way in which that would operate would be
35 the manner in which I have indicated in that document;
36 namely, that a person would go to the Minister or the
37 traditional owners and ask for their permission for
38 certain information to be divulged, or, if something has

1 already occurred, go either to the Aboriginal Heritage
2 Branch, the Minister, or traditional owners who would
3 then communicate or decide on prosecution.

4 The other point we make is that with regard to s.35,
5 it's not only the information about Aboriginal tradition
6 which is protected, but the manner of its promulgation.
7 Merely because certain information may be in one area -
8 and it could be, for example, in a journal, in an
9 article, in a report - does not mean that that can be
10 repeated in another different environment altogether.
11 It doesn't give the right for the same information to be
12 divulged in a different environment, by different
13 persons, with a different purpose. Therefore, it is not
14 only the information, but the way and manner in which
15 it's divulged.

16 We submit that the occasions which would be most at
17 risk of potentially offending s.35 would occur in the
18 following situations. Firstly, where the subject matter
19 of the divulgence is claimed by Aboriginals to be
20 Aboriginal tradition - and certainly that is the case in
21 this case - and that relates to either Aboriginal
22 tradition or a site or remains, and that certainly
23 applies this this case. Secondly, that it is sought to
24 be divulged in particular by a non-Aboriginal person to
25 another non-Aboriginal person. Thirdly, it's done for a
26 purpose which is not for its protection and respect, but
27 for the purpose which is to criticise it.

28 We say that when those three situations occur, there
29 is a real potential for s.35 to operate. We say that it
30 is for Aboriginal people, as we said, to choose prima
31 facie what and how Aboriginal tradition should be
32 divulged; and that is not very dissimilar to what
33 happens in ordinary life. In fact, to take an example
34 of defamation - I know there are certain rules about
35 defamation, so I can't use an example in a complete
36 sense. Merely because one says something in one
37 environment, may not mean that the same words used in
38 another context might not offend in a way that would be

1 defamatory. That depends in the manner, context, and so
2 forth.

3 The similar happens with Aboriginal tradition. The
4 mere fact that it might be in a venue which is perfectly
5 acceptable to the Aboriginal people in one context, does
6 not mean to say that it should be regarded as been given
7 in another situation and may not, in fact, offend their
8 view of the way in which it should be divulged.

9 On that basis, we ask you to rule that the
10 interpretation we would have suggested - namely, the
11 broad one - is applicable and that it should not be
12 restricted, as I said, to secret sacred, confidential,
13 private, and nor is it excluded from operation, even if
14 the information is in the public domain.

15 With regard to s.35, and the reason I'm even here
16 today is because counsel assisting indicated that the
17 evidence which would be sought to be called (and I'm now
18 reading from p.1371 of the transcript), Mr Smith says
19 there is evidence that does not even potentially breach
20 s.35 of the Aboriginal Heritage Act. He continued on
21 p.1372 to say:

22 'We feel we can commence with some of that evidence, and
23 it's oral evidence and documentary evidence which can be
24 attended to and distributed which does not touch even
25 potentially s.35, which is, none the less, relevant to
26 this inquiry'.

27 Again, on that same page:

28 'My submission to you is that we ought to take the
29 opportunity to call that evidence which doesn't require
30 the s.35 authority.'

31 Continuing on, and this time an indication from you as
32 to what you expected from the witnesses, at p.1365 you
33 indicated that:

34 'I would certainly not be suggesting that any witness be
35 called where there was a prospect of s.35 issues arising
36 in the state of affairs.'

37 Also, at p.1373, indicating after - and this is on the
38 Friday after there had been various submissions from all

1 counsel, save counsel assisting, that there ought to be
2 an adjournment of the evidence, indicating that if the
3 Commission can call evidence which doesn't even
4 potentially breach s.35:
5 'I consider that would be appropriate to do so.'
6 And then referring to a rescheduling of witnesses and
7 then saying:
8 'It appears to me that in the circumstances, the
9 Commission should proceed with any noncontentious
10 evidence and I understand that in the context to me
11 within the framework of s.35, that, accordingly, I would
12 propose to adjourn.'
13 Again, Commissioner, indicating at p.140 that you
14 understood that counsel assisting believed that the
15 evidence did not raise an issue of s.35. Also, at
16 p.1405, where you would hear evidence if it appeared to
17 you that there is no problem raised with s.35, then it
18 would not be inappropriate to call that evidence.
19 In this circumstance, going back to the definition
20 of 'Aboriginal tradition' as it's set out in the Terms
21 of Reference, anything which touches on Aboriginal
22 tradition as defined in the Terms of Reference would, in
23 fact, prima facie, come within s.35. Similarly,
24 anything which comes within the definition and
25 description of women's business as set out within the
26 Terms of Reference, comes within s.35.
27 On that basis, we suggest, yet again, that the
28 matter ought to be adjourned. Here is an example where
29 counsel assisting has assured you that this is not going
30 to involve s.35. We submit that perhaps on his
31 interpretation it may not, but what is being called upon
32 you at the moment is to make a ruling on that which
33 should never have to be within your province. It
34 shouldn't be placing either your Honour or the counsel
35 or witnesses in a situation where you normally would
36 never have to be responsible for making decisions as to
37 what is or is not within Aboriginal tradition, and
38 without having the benefit of that which a Minister

1512
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- 1 would have, which is to consult with Aboriginal persons
- 2 about it.
- 3 CONTINUED

1 We would submit, therefore, that no evidence should
2 be adduced at all until such time as these consultations
3 have been undertaken and the Minister makes a
4 determination.

5 In the alternative - and this is a very fifth best
6 alternative - that, if you were minded not to adjourn,
7 we would make the following submission:

8 That you make a ruling, in addition, that there be
9 no evidence called from any witness where that witness's
10 evidence refers or may refer to any aspect of asserted
11 Aboriginal tradition. And, in particular, that which is
12 described as women's business in the Terms of Reference,
13 pending any authorisation of the Minister. And, in
14 particular - and I have not addressed the Saunders
15 report - but, in particular, we would request that you
16 not change the status of the Saunders report, within
17 this Royal Commission, pending, again, a decision by the
18 Minister on whether or not there is to be an
19 authorisation. But, as I say, that is a very fifth best
20 alternative. We say that the risks are too great and
21 that, what has happened, when an assurance was given
22 that something wouldn't potentially involve s.35 makes
23 it clear that probably all of the material that is going
24 to be now be sought to be divulged may well offend this
25 section and the risk is too great.

26 And that completes our submissions.

27 MR ABBOTT: I only rise, not to make submissions,
28 but to invite you to enquire from those counsel present
29 and indeed those not present, but who have indicated if
30 they know who rises to support Ms Layton and who rises
31 to make contrary submissions. And I want to make
32 submissions and I would like the indulgence of around
33 about the same period of time as Ms Layton and obviously
34 today is not the day and I invite you to find out who
35 wants to make submissions and we adjourn until tomorrow
36 morning for this matter.

37 MR TILMOUTH: I would like to support Ms Layton. As
38 usual, I will be very short. I expect to have about a

1 five minute submission.

2 COMSR: So, you would like the opportunity to
3 make submissions?

4 MS PYKE: Yes, likewise, I would be supporting Ms
5 Layton's submissions. I would be making very brief
6 submissions myself.

7 COMSR: What I would like to know -

8 MR MEYER: I was waiting for anybody else that
9 might happen to speak. I will speak against Ms Layton's
10 submissions and, in particular, provide the Commission
11 with some information in relation to the release of the
12 Saunders report along the lines that I discussed
13 yesterday.

14 COMSR: Where does that leave us, Mr Smith? Are
15 we in a position to proceed with the witness?

16 MR SMITH: Can I suggest that we have a short - and
17 I mean short - five minute adjournment to confer?
18 Because I think Mr Abbott has in mind not proceeding
19 with any evidence today.

20 MR ABBOTT: No, we only allowed half an hour this
21 morning. Ms Layton has had an hour. I think, to put
22 the contrary position, it will take about the same time
23 and I suggest we go ahead with Mr Denver and get on with
24 it.

25 COMSR: Yes, we are only concerned with a very
26 small passing of comment, as I understand.

27 MR SMITH: Yes.

28 MS LAYTON: Needless to say, I object to that
29 process.

30 COMSR: What process?

31 MS LAYTON: The process of Mr Denver being called,
32 pending further submissions on this. I haven't seen Mr
33 Denver's evidence and I don't know the extent to which -

34 MR ABBOTT: It is not appropriate you should have
35 seen it. And I don't want my failure to object to my
36 learned friend to be the basis of any concession of her
37 standing to make these submissions.

38 COMSR: I appreciate that. What I propose to

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- 1 do, at this time, is to adjourn for five minutes, as
- 2 requested by Mr Smith, and assess what the situation is
- 3 in respect of proceeding.
- 4 ADJOURNED 10.35 A.M.

1 RESUMING 10.47 A.M.

2 MR SMITH: It is intended to call Mr Denver, as
3 indicated before. Save only that the tape, apart from
4 being identified and marked for identification, that is,
5 the tape of the conversation with Douglas Milera, will
6 not be played, beyond being marked and identified. And
7 the raw footage tape of the Channel 10 television
8 interview will be no more than marked for
9 identification, also, without being played. In that
10 way, you can take the arguments tomorrow, make a ruling
11 and then those matters, subject to your ruling, can be
12 addressed.

13 COMSR: I am not quite sure I understand what
14 you are proposing.

15 You are proposing to take Mr Denver through further
16 evidence?

17 MR SMITH: Yes.

18 COMSR: And to omit anything which has been the
19 subject of a submission before me, because -

20 MR SMITH: The tape recording of the conversation
21 with Douglas Milera will not be led, in the sense that
22 it will not be played, today. I will be seeking to do
23 that tomorrow. Subject to your ruling. The tape
24 recording, the video tape recording of raw footage taken
25 by Channel 10 at the Appollon Motel will not be played
26 today.

27 COMSR: So, you are going to proceed as far as
28 you can?

29 MR SMITH: Yes.

30 MR ABBOTT: I am sorry to ask a question, but could
31 I ask, through you, how long that evidence is going to
32 take? Because it seems to me that I was under the
33 impression that we were going to be here for half an
34 hour this morning. And, from what I had been told
35 yesterday it was likely that Mr Denver would go all day
36 today. It would appear to me that, if we are going to
37 be deprived of the tape and the video tape, that, on the
38 statement I have got, the rest of Mr Denver's evidence

K.D. DENVER XN (MR SMITH)

1 wouldn't take very long. And that, if that is so, then
2 there is no point in not getting on with the arguments.
3 And I made my application on the basis that he was a
4 witness. First of all, it would be handy to have some
5 time, but it is not essential to have some time to
6 consider Ms Layton's submissions. But I primarily made
7 my application on the basis that we had a witness
8 waiting at 10 o'clock who I expected was going to take
9 all day. I merely ask, then, how long is it now
10 expected Mr Denver is going to take? Because, if, for
11 example, he is finished before lunchtime, we might as
12 well come back this afternoon and argue it, rather than
13 tomorrow morning. That's all.

14 MR SMITH: That is the case, I suspect.
15 Particularly as it is evidence in chief. It will be
16 omitting the tape, which is some hour, approximately.
17 It will be omitting the raw footage of the Channel 10
18 interview at the Appollon Motel on the evening of the
19 5th, which is, again, approximately an hour. That will
20 then come out of his evidence and Mr Abbott is indeed
21 right. Just taking him through and omitting to adduce
22 that, the evidence will I expect conclude by lunchtime.
23 COMSR: You would be applying to come back this
24 afternoon?

25 MR ABBOTT: I vary my application and, rather than
26 ask you to adjourn the legal argument over to tomorrow
27 morning, you adjourn until 2.15 and hear the rest of us.
28 And that would give you overnight to consider it.

29 COMSR: That would appear to be the most
30 convenient way to proceed.

31 MR SMITH: I call Mr Denver back to the witness
32 box.

33 WITNESS K.D. DENVER ENTERS WITNESS BOX
34 EXAMINATION BY MR SMITH CONTINUING

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

36 A. Right.

37 Q. We had reached p.8 of your statement, which is Exhibit
38 57. You told us that Mr Milera, whilst with you alone

- 1 at the Middleton Tavern, had started elaborating on
2 unionists, using their names, their involvement, the
3 part they played, etc., that's right, isn't it.
- 4 A. That's right.
- 5 Q. And I ask you if you could tell us what he said on those
6 topics.
- 7 A. He was referring to the involvement of the unions,
8 particularly the CFMEU, and naming various people within
9 that union. I indicated yesterday that I was only
10 familiar with the one person from the union, so any
11 other names meant nothing to me.
- 12 Q. Who was that person, again.
- 13 A. Dave Thompson.
- 14 Q. You can't remember any of the other names.
- 15 A. I think it was Carslake, or something. But he listed a
16 whole heap of them and they meant nothing to me, because
17 I hadn't been following it. He was also listing
18 Aboriginal people who had involvement in this. That,
19 once again, meant nothing to me. I mean, I knew who
20 Doug and Sarah were and some of the ones in the press,
21 but people - he mentioned Victor Wilson having a major
22 involvement, but I didn't know Victor Wilson at all.
- 23 Q. Did he ask you, at some stage - as you have indicated in
24 your statement - is it the case that he asked you
25 whether you were bugged, or something like that.
- 26 A. Yes, he wanted to know if I was taping what he was
27 saying and whether I was bugged. And I assured him that
28 he had just rung me. I came over. I am only a bloody
29 farmer, so the last thing I am likely to have is all
30 this stuff and I thought he must have been watching too
31 much TV.
- 32 Q. Your statement shows that the next topic that was
33 discussed was whether or not the bridge should be built.
34 Can you tell us what he said about that.
- 35 A. Doug was, as I pointed out before, extremely upset about
36 the fact that the Chapmans were likely to be thrown out
37 of their house and he discussed that over and over. He
38 also said that he felt that the bridge should be built.

1 The bridge was holding back the town and the district.
2 He could see that. After being brought into the town,
3 he could see that for himself. That the town needed it.
4 The people in the town wanted it. If the bridge wasn't
5 built, the Chapmans should be compensated. He thought I
6 should be compensated. He thought everybody in the
7 district should be compensated, but he thought the
8 bridge should be started. It should be started
9 immediately and these others should just butt out and
10 let us get on with our life.

11 Q. Was it, at this stage, that you decided that you would
12 contact the Chapmans.

13 A. Yes, I told Doug that the bridge should happen, because
14 the bridge was on the drawing board, it had been
15 mentioned for years before the Chapmans ever came on the
16 scene. So, the media and the anti bridge lobby were
17 trying to link the Chapmans and the bridge, but it is a
18 bit of a furphy, because eventually the bridge is going
19 to happen. All Chapmans were doing was accelerating it.
20 He was referring to, as I said, these people that I
21 didn't know. And I suggested to him that the only one
22 that I knew that was really following this is, in fact,
23 the Chapmans, because they had their neck on the line.
24 `What say I give Tom Chapman a ring and see if he will
25 come over? And it might be useful information to him',
26 but there was not much point telling me.

27 Q. At that stage, how long had you been at the Middleton
28 Tavern. You will remember you arrived, I think, at
29 about 2.30, is that right.

30 A. No, I picked him up at 2.30 and that was on the dot at
31 2.30, pretty well. So, it would have taken twenty
32 minutes, fifteen to twenty minutes to get to the tavern.
33 And, from memory - from here, it was 15.06 when I rang
34 Tom Chapman. So, whatever that gap is.

35 Q. That is three minutes past 3, is it. Six minutes past
36 3.

37 A. Six minutes past 3 that I rang Tom Chapman. So, we
38 would have been there from quarter to three. So, we

- 1 were there for twenty minutes when, you know, we just
2 sat down, had a drink, talked about it and he started
3 listing out all the names. And I said `It is pointless
4 telling me. Let's get somebody that knows the facts.'
5 And I rang Tom Chapman.
- 6 Q. You have said 15.06, that is, six minutes past 3, on the
7 basis of, what. How are you so precise about that.
- 8 A. I am only a farmer, but I have got a mobile phone and it
9 is all recorded. Anything that goes out is recorded and
10 on my home telephone bill, any time I am rung on it, it
11 is recorded. Being long distance, it is just listed.
- 12 CONTINUED

K.D. DENVER XN (MR SMITH)

- 1 Q. Looking at these two itemised call detail documents
2 produced to you, do you recognise those as copies of
3 your mobile telephone accounts.
- 4 A. Yes. My home account and my mobile account are both
5 here.
- 6 Q. In order to fix that time, you have actually refreshed
7 your memory from those accounts, have you not.
- 8 A. Yes. Fortunately, I try and let people ring me on the
9 mobile, and there is only 15 things listed here on the
10 mobile account of which more than half took place on the
11 date in question.
- 12 Q. Can you refer us to the 1506 mention of 15 June.
- 13 A. Yes (INDICATES).
- 14 Q. So you are looking at a small cluster of itemised call
15 details.
- 16 A. Yes.
- 17 Q. On a page which is about three quarters blank.
- 18 A. Yes. 5 June 1995, 1506, a call was picked up at Victor
19 Harbor relay station. I called Chapman's home phone
20 number. The call took one minute and one second.
- 21 Q. You recognise Chapman's number there.
- 22 A. Yes, I do.
- 23 Q. Who did you speak to.
- 24 A. I spoke to Tom Chapman, and I told Tom what the setup
25 was. I said 'I'm in the tavern'. That was a bit
26 surprising because I don't normally wander around hotels
27 during the middle of a working day. I said 'I'm over
28 here at Middleton with Doug Milera. He is rabbiting on
29 about all the people that are involved in the bridge -
30 in stopping the bridge. He's naming unionists. He is
31 naming other Aborigines. It means nothing to me. Are
32 you interested?' Tom Chapman indicated that, sure he
33 was interested, but he didn't think that he should be
34 seen with Doug Milera because, I don't know, they had
35 lots of court things going on and it was just not the
36 right thing to be done. However, he said he'd come.
- 37 Q. At that stage, at 6 minutes past 3, you and Doug Milera
38 had had how many drinks, can you tell us.

K.D. DENVER XN (MR SMITH)

1 A. We would have - I thought I was going to be with the guy
2 for about half an hour and go back to work, so I had a
3 lemon squash and I think, from memory, Doug drinks
4 Southwark something or other, and he would have only had
5 one, because he told me he had no money and I sure as
6 hell didn't go prepared with money either.

7 Q. Who paid for that round of drinks.

8 A. I paid for it.

9 Q. While you were waiting for Tom Chapman to come to the
10 tavern, you talked on with Doug Milera, did you.

11 A. We talked about lots of different things, just general
12 things. We - Doug was clearly agitated. He was worried
13 about his future, no money, his marriage, everything,
14 and he ran out of cigarettes. So most of the time was
15 filled up with getting the cigarettes from the publican
16 at the tavern. As we were the only ones there, the guy
17 went out and got them, and they were the wrong ones.
18 This took forever to get Doug the right cigarettes, and
19 that just about skun me out of money because, once
20 again, I bought the cigarettes. I said 'No, I'll get
21 them'. One thing that we did discuss, that I have
22 remembered since that's not in here - am I allowed to
23 mention that?

24 Q. Certainly.

25 A. Is the fact that we did mention the Draper episode when
26 Doug Milera was with Neale Draper on the island. As
27 I've indicated, we own just short of a quarter of
28 Hindmarsh Island. I was very interested in what was
29 happening with Draper's report. I thought, seeing as
30 how I helped Draper, surely one day we were going to
31 know what's in the damn thing. And I said to Doug that
32 people had been phoning me, saying that Draper was
33 running around putting things in places rather than
34 finding them, and I didn't want that sort of rubbish to
35 get out because it was bad for everybody. Doug told me
36 that Draper didn't know shit, and he said if it wasn't
37 for him pointing out things, Draper would still be there
38 with his pencil. Draper didn't know shit. Am I allowed

K.D. DENVER XN (MR SMITH)

- 1 to say that? This is what he said.
- 2 Q. Is that all on the Draper topic.
- 3 A. This is what we talked about. Then we went on with - by
- 4 then Tom Chapman had arrived.
- 5 MR SMITH: I think that at least the first section
- 6 of that evidence about Mr Draper should be suppressed,
- 7 that is, that he was placing things -
- 8 COMSR: It shows the danger of leading evidence
- 9 where you haven't got a statement about it.
- 10 MR SMITH: You had to hear it. I am just
- 11 suggesting you take the precaution of suppressing it for
- 12 the time being. That is, that evidence that Mr Draper
- 13 was involved in planting material, culture, if I could
- 14 say. Perhaps the words used by Mr Denver ought to be
- 15 read back, so there can be no debate about it.
- 16 MR LIVESEY: I would certainly seek such an order
- 17 from you at this time. This is the first time we have
- 18 heard anything of this kind at all.
- 19 COMSR: It is the question and answer.
- 20 MR SMITH: It is the first part of the answer, in
- 21 my submission, which should be suppressed.
- 22 COMSR: It is that part of the answer which
- 23 suggests that Mr Draper had planted something on the
- 24 island.
- 25 MR SMITH: Yes.
- 26 WITNESS: Am I allowed to say anything? It is not
- 27 Mr Draper that was planting. I'm sorry if - the people
- 28 that were with Mr Draper I'd been told, so.
- 29 COMSR: Whatever. The application is that the
- 30 evidence suggesting that things had been planted on the
- 31 island is what you are seeking to have suppressed?
- 32 MR SMITH: Perhaps we will just clarify the whole
- 33 topic, could we, first? My learned junior suggests that
- 34 we could leave this topic for tomorrow. For the time
- 35 being, that part of the evidence which suggests that
- 36 either Mr Draper or any of the people assisting him in
- 37 his survey were planting relics or whatever should be
- 38 suppressed.

K.D. DENVER XN (MR SMITH)

- 1 COMSR: `Things' I think it is the word used.
- 2 MR LIVESEY: My application is that all of the
3 references to Dr Draper, given that they are, by their
4 very nature, not direct references from Dr Draper,
5 should be suppressed.
- 6 COMSR: I think the whole of that answer is what
7 you are submitting?
- 8 MR LIVESEY: That is my application.
- 9 MR SMITH: I do not support a suppression of that
10 portion of the evidence where Mr Denver was quoting that
11 Mr Draper didn't know shit. The other part is
12 potentially extremely damaging.
- 13 COMSR: Does anyone else want to be heard on
14 this? I do think that there should be an order
15 suppressing that part of the evidence of the witness
16 which suggests that either Mr Draper, or persons
17 accompanying Mr Draper, had planted things on the
18 island. Is anyone not sure what that suppression order
19 covers?
- 20 XN
- 21 Q. So that was one of the topics that was discussed pending
22 the arrival of Mr Chapman. Anything else.
- 23 A. No.
- 24 Q. Mr Chapman arrived within a few minutes of the phone
25 call, or how long would you say.
- 26 A. I don't know whether Tom Chapman jumped straight in his
27 car or not, but he was still on Hindmarsh Island. You
28 still have to get across the ferry, so he couldn't have
29 been there - if he left immediately, it would have been
30 25 minutes if he caught the ferry and left straight
31 away. So it was probably within half an hour of the
32 phone call.
- 33 Q. So he arrived, can we take it, within about half an
34 hour.
- 35 A. About half past 3, roughly.
- 36 Q. What happened then.
- 37 A. Tom Chapman arrived, we sat back down, talked about
38 virtually the same things as Doug had told me, but this

K.D. DENVER XN (MR SMITH)

1 time he was speaking to somebody who knew who the people
2 he was referring to were. There wasn't a lot of new
3 ground covered, other than the fact that Doug apologised
4 several times to Tom Chapman for his involvement in
5 this, which may have led to him being thrown out of his
6 house.

7 Q. Perhaps it is a matter more for Mr Chapman than you, but
8 did Doug Milera appear to know Tom Chapman, or can't you
9 say.

10 A. Well, I'm not sure. To me it seemed like it was the
11 first time he'd ever met him other than via the media.
12 He obviously knew who he was, but they weren't
13 buddy-buddy.

14 Q. I think there was a situation where Doug Milera made a
15 telephone call himself. Is that right.

16 A. Yes. During the course of the day, Doug made several
17 phone calls, but he - Tom Chapman was a bit paranoid
18 about being there. He didn't think it was the right
19 thing to be seen with Doug, pending whatever they were
20 doing at the time. It just didn't look right.

21 Q. He said things to indicate that, did he.

22 A. Well, while Doug used Tom's phone to ring Chirpie
23 Campbell in Sydney. Tom Chapman was concerned that he
24 was picking up the tab, because it was a long phone
25 call. He was also concerned about being there because
26 he thought, well, frankly, I guess, the press would have
27 a field day, wouldn't they? And they did.

28 Q. Can you place for us the approximate time when the
29 Chirpie Campbell telephone call was made.

30 A. Yes. While Doug was - we were in this building
31 virtually alone, it had side doors, he just went out of
32 one of the side doors onto a little patio area, and Tom
33 and I just sat there talking about 'Oh God, it has been
34 a big day, fancy all this happening', and I realised
35 what time it was. I have got a daughter who I was
36 supposed to pick up from the school bus, and I realised
37 it was 1650 at that stage.

38 Q. So, again, you fix 1650 by reference to your telephone

1 account records, do you.

2 A. Yes. At 1650 I rang my own number at home for a short
3 call, and spoke to my 9 year old daughter. I can
4 recall, in my normal manner, I said 'Well, I haven't
5 picked you up from the school bus. Are you okay?' And
6 she was fine.

7 Q. Was that at the time that Mr Milera was using Tom
8 Chapman's phone to ring Chirpie Campbell.

9 A. I think it would be overlapping. He was on Chapman's
10 phone and I was on my phone. At that stage I had a
11 problem, I was 40 minutes away from my house, my
12 daughter at home, and it didn't look like I was going to
13 get out of the place. So I then made another phone
14 call.

15 Q. Can you tell us, first, if Milera explained it to you,
16 what he said about why it was that he rang Chirpie
17 Campbell in Sydney.

18 A. Doug indicated to me that he wanted to tell everybody,
19 to tell everybody that it's about time the truth came
20 out. He helped fabricate all this, and he wanted to
21 tell me, he wanted to tell Chapmans, he wanted to tell
22 the press, and he wanted to get things straight and get
23 it working, and he rang this Chirpie Campbell in Sydney.
24 As to what he said, I mean, Tom Chapman and I just left
25 him alone to do his own thing. We weren't there during
26 any of the conversation.

27 Q. Did Doug Milera explain to you who Chirpie Campbell was
28 and why he wanted to ring him.

29 A. I've come across Chirpie Campbell before, mainly in the
30 media, and I knew roughly who he was. I didn't know
31 what relationship there was with Doug Milera, but Doug
32 just took Tom's phone out and, well, it must have been a
33 Sydney number, so he dialled that, and then he came back
34 in and something went wrong so he dialled again. I
35 think he was cut off or whatever.

36 Q. You eventually all got back together again, did you,
37 you, Chapman and Milera in the tavern.

38 A. While he was out there I made a few more phone calls. I

K.D. DENVER XN (MR SMITH)

1 needed to contact somebody from the press because Doug
2 wanted to give the story across.

3 Q. He asked you to do that, did he.

4 A. Yes. Doug said 'This has to get out. We need to make
5 it public that the whole thing was a fabrication', and
6 more than that, it was his involvement. So I was trying
7 at that stage to track down somebody that we could trust
8 from the press. I have not a very high regard for them
9 at the moment. At that stage Channel 10 had been
10 running what looked like - they were running what was
11 happening, not what they thought people wanted to hear.
12 So I said 'What about Chris Kenny?'

13 Q. You placed some calls to Channel 10 then, did you.

14 A. I had no idea how to contact Channel 10. So I rang
15 Wendy Chapman and I asked Wendy. I said 'Look, I want
16 to contact this guy at Channel 10. You have more
17 contact with the media than I have. Have you got their
18 number?' How I could contact them.

19 Q. You have got a record of that call to Wendy Chapman,
20 have you.

21 A. Yes. I've got the record here. It was - the whole
22 phone call took - we've got two of them here. It is
23 itemised on here. Do you want me to go into all that?

24 Q. Just the time. Is it as in the statement, 1651.

25 A. Yes. 1651 I made a phone call to Wendy Chapman.

26 Q. So that's nearly 5 o'clock, is that right.

27 A. Yes.

28 Q. So you and Tom Chapman and Douglas Milera had been at
29 the Middleton Tavern, by this stage, you from about
30 quarter to 3 to about 5, and joined by Chapman at about
31 half past 3 to about 5.

32 A. That's correct.

33 Q. Had you been drinking in that time, the three of you.

34 A. Not long after Tom Chapman arrived, he had a squash and
35 I had a squash. Doug was still on the telephone. I
36 think Tom Chapman was at the stage of nearly boiling
37 because it was a Sydney phone call on his phone. It
38 wasn't until Doug finished that we got - asked him if he

K.D. DENVER XN (MR SMITH)

1 wanted another drink. So, yes, he would have probably
2 had another. Once again a stubbie of beer, which would
3 have been, as you pointed out, probably nearly an hour
4 and a half gap to the second one. So the publican
5 wouldn't have been making much money.

6 Q. So you contacted Wendy Chapman. Can you tell us what
7 happened as a result of that. She gave you the number,
8 you indicate there in your statement.

9 A. Yes. I got the number for Kenny's - I think it was his
10 mobile phone number. Then I rang Wendy Chapman back
11 again not long afterwards and said 'I've got a few
12 problems in the fact that I'm still here. It looks like
13 Doug wants to meet with the press and my daughter's over
14 on Hindmarsh Island'. So I arranged for Wendy to go and
15 pick my daughter up just so as I knew where she was
16 because it was -

17 CONTINUED

18

1 Q. You there record in your statement, at the bottom of
2 p.9, that you made that telephone call at 1703.

3 A. Yes.

4 Q. Three minutes past five.

5 A. At 1703, I rang Wendy and asked her to go and pick up
6 Georgie and three minutes, around about that, I rang my
7 daughter and said 'If Wendy comes to pick you up, it's
8 okay to go with her'. And then as soon as I finished,
9 three minutes later I rang my wife and said what I was
10 up doing and the fact that Georgie is okay and somebody
11 is picking her up and could she get to Wendy by the time
12 she finished work in Victor Harbor and rendezvous at
13 Middleton and get Georgie, and I made it all clear.

14 Q. Did you eventually get to ring Chris Kenny.

15 A. Yes. I had a phone call, I think, back from my
16 daughter. She rang me back to see what was happening
17 and wondering what was going on with Wendy and when she
18 was going to be picked up. My batteries were starting
19 to go beep on me and so I was in a bit of a sad way.
20 So, I used Tom Chapman's phone to ring Kenny - and I
21 haven't got exactly what time here as it's not on my
22 bill. I used that phone, rang Kenny, and said 'Look,
23 this is what I've got. Are you interested?'. Well, he
24 was interested and we arranged to meet at Victor Harbor
25 at 8 o'clock at the Appollon Motel, which worked out
26 well for timing for him from Adelaide and us from
27 Middleton.

28 Q. Doug Milera made a number of telephone calls, you make
29 that known on p.10.

30 A. Yes.

31 Q. You don't know to whom.

32 A. I have no idea. We left him to himself. He was just -
33 we thought he was relaxing and talking to whoever his
34 friends were on the phone. And we had to fill in time
35 between meeting the media. I'm not sure who he called
36 or whatever.

37 Q. I think, as you make clear in the middle of p.10 of your
38 statement, that Wendy Chapman and your daughter Georgie

1 arrived.

2 A. Yes, Wendy and Georgie arrived. Doug must have been
3 still on the phone. And they come over and said hello
4 to me and what have you. Doug finished and went and
5 apologised to Wendy for his involvement, and the fact
6 that they were losing their house and it was his fault.
7 Wendy was probably more agitated than Tom to even be
8 there. My wife turned up in the meantime. I said 'I
9 haven't got any money left'. Got some money from my
10 wife to give it my daughter. She left. We'd looked
11 like we were going to be missing out on tea in the
12 travelling process. We ordered some food - and I can't
13 remember what or when or who. But we ordered food. The
14 Chapmans were, as I indicated, were trying to get out of
15 the place. Shortly afterwards, we'd finished eating and
16 the Chapmans went their way and I took Doug to meet
17 Chris Kenny at Victor Harbor.

18 Q. Did Doug Milera have a meal with you.

19 A. I can't recall what it was. But I know I ordered
20 specifically what I wanted and I knew that Tom Chapman
21 would probably eat chips and stuff, and there was other
22 food on the table that we all shared. Doug would have
23 had access to that. I can't recall what he ate.

24 Q. Your arrangement was to go to the motel at 8 o'clock.
25 For how long did you stay on then at the tavern at
26 Middleton.

27 A. Well, by the time that the Chapmans left and my wife
28 left, there was only a matter of minutes between when we
29 had to leave and finish eating and being over there to
30 get there. There was no time really.

31 Q. Could you give us an estimate of what time you left the
32 Middleton Tavern, you and Doug.

33 A. Yes. It was Doug and myself in my vehicle.

34 Q. What time did you go to the Appollon Motel at Victor
35 Harbor.

36 A. Twenty to, quarter to eight.

37 Q. In that time, in all that time that you had been at the
38 Middleton Tavern then from quarter to three until

1 quarter to eight, or thereabouts, what is your estimate
2 of how much liquor Doug Milera had to drink.

3 A. Well, he couldn't have had more than three stubbies. I
4 didn't have any money. I would say the whole time from
5 the time we arrived until the time we left, three
6 stubbies.

7 Q. Did Tom Chapman buy any.

8 A. Tom Chapman was asking me if I had any money because
9 when he arrived he didn't know what was happening and he
10 said he left home with no money also. We both had
11 squashes because, well, we didn't know where we were
12 going and what we were going to be doing, and, as I
13 said, I was strapped for money.

14 Q. You drove across then to the Appollon Motel about a
15 quarter to eight on that evening. When you got there, I
16 take it from your statement, the Channel 10 crew hadn't
17 arrived - Chris Kenny and a cameraman.

18 A. I would say that we got there probably 8 o'clock on the
19 dot virtually. We looked around for a Channel 10
20 vehicle. They weren't there. We approached the girl
21 behind the desk and she said they are not there yet.

22 Q. In your estimate, what was the condition of Doug Milera
23 at the time that you arrived at the Appollon Motel.

24 A. Doug was clearly agitated, but he had been agitated all
25 day. He was perfectly sober. There was no reason for
26 him not to be in the period of time and the beer that
27 had been consumed. He was worried about the fact that
28 he had no money. He wasn't sure where he was going to
29 stay, if he wanted to stay in Victor Harbor that night.
30 He was more worried about that than anything. I pointed
31 out the fact to him - I was still wary of all of this
32 and I told him if he didn't like what was happening, to
33 tell them to shove it.

34 Q. Although, you had gone to a lot of trouble to spend the
35 whole afternoon with him, contacted the press, made the
36 arrangement for the Appollon Motel.

37 A. Yes. Well, I did point out to Doug - that's correct,
38 that I probably wanted the bridge more than anybody. I

- 1 organised the rallies and stuff about the bridge and I
2 had seen what the media and the attitude about this had
3 done to my life. And I said to him `After all, it's
4 only a bridge. If you don't like the way it's going,
5 give it a miss'.
6 Q. Was that put to him seriously, in the sense that -
7 A. I pointed it out to him from the time he got in my car,
8 if he didn't want to tell me, don't do it. I pointed
9 out to him during the day - I don't know why I did. I
10 should have screwed him for what I could, get out of him
11 what I could. That's what everyone had done to me. I
12 pointed out to him over and over again, because the
13 press and the Kumarangk Coalition made me look bad and I
14 didn't want them to suffer like I had and I said `It
15 wasn't worth it'.
16 Q. When you were urging that upon him, what was his
17 reaction to that when you were saying to him `If you
18 don't want to go on with it, don't do it'.
19 A. He said there is no way he is not going to do it, he is
20 not going back and he is going ahead with it.
21 Q. You waited then for Chris Kenny and the cameramen to
22 arrive. Where did you do that. Did you wait in the
23 reception area.
24 A. Right at the foyer. We walked in and on the front desk
25 it was 8 o'clock and the guy was going to be there at 8
26 o'clock, so we just stood there, and in less than five
27 minutes he turned up.
28 Q. Whilst you were waiting in the motel, did you have a
29 drink.
30 A. I can't recall. I don't think there was enough time at
31 that stage. And, once again, I wasn't in a financial
32 position to be forking any more out on somebody I was
33 still not sure about.
34 Q. Is it the position that you can't remember.
35 A. I don't think at that stage we had another drink.
36 Q. Kenny arrived, you said, a few minutes later than 8
37 o'clock or -
38 A. It was within five minutes after that.

1 Q. What happened then.

2 A. Well, he obviously didn't know me from a bar of soap and
3 so we just introduced and then - and the same with Doug.
4 And he just asked the receptionist, I think he arranged
5 for a motel room, because he thought that Doug wanted to
6 stay the night in Victor Harbor and Doug could have the
7 room when we finished. Doug indicated there was no way
8 he was going to stay at that joint and wanted to stay
9 somewhere else and not there. So the Channel 10 crew
10 asked the girl and the girl said 'What about the
11 conference room?'. That was a big room that was closed
12 off. That was fine and we went in there.

13 Q. There was Chris Kenny. His crew consisted of whom.

14 A. He had a cameraman who was, at that stage, getting rid
15 of the car.

16 Q. One other person.

17 A. Yes.

18 Q. The four of you then gathered in the - what was the name
19 of the room.

20 A. It was a conference room.

21 Q. The conference room. You were there at the Appollon
22 Motel for what period of time, all told.

23 A. Well, from 8 o'clock until, I think, the end of the day
24 when I dropped Chris Kenny back in there to his car,
25 would have been 11.30.

26 Q. In broad terms, as you have indicated in your statement,
27 that was involved with really a recorded interview, was
28 it not.

29 A. Yes. During that period of time we went into this room,
30 I think we would have had a drink at that stage, so
31 whoever is after that would have got it. Kenny had, we
32 just had a little table - it's set up as a dining room
33 and had a few tables and we sat on one table, the three
34 of us. It was a small four-seater table. I asked Doug
35 'Do you want me to go?', because it was none of my
36 business what he was up to, and he indicated that he
37 wanted me there. He, for some reason, thought he could
38 trust me and I stayed there.

1 Q. So, you, in effect, witnessed the interview and the -

2 A. Yes.

3 Q. And the camera working.

4 A. I was there from the time Doug arrived until the time we

5 dropped him off at the end of the night, all bar a

6 matter of a few minutes when he was directly being

7 filmed on the film. I - the letter that is now history,

8 I had typed up.

9 Q. I will come to that in a minute. I take it that the

10 cameraman set up lights and other things as a prelude to

11 filming Doug.

12 A. Yes. Kenny and myself and Doug sat there for quite a

13 while. The cameraman goes out to the car and starts

14 bringing all the TV guff in. And Doug was clearly

15 agitated about - well, they were clanking and clanging

16 around and banging and so on, and he was getting a bit

17 agitated about that.

18 Q. Did you raise with him the question of pulling out if he

19 wanted to at that juncture.

20 A. Yes. Every now and then, Chris Kenny - I think by then

21 we'd talked for at least an hour, I would think, before

22 the guy was anywhere near setting up his camera gear.

23 And Kenny approached the guy about, you know, setting

24 all of this up here and what have you. While he was

25 doing that, I said 'If this guy screws you, you tell him

26 to shove it. If you are not happy, we can go'. I said

27 - it looked to me as if we might have got a good guy

28 this time. He seemed to be just going through

29 everything with Doug. Doug was relaying to Chris Kenny

30 the names of the Aboriginals involved, the names of the

31 unionists, as he had done to Tom Chapman earlier in the

32 day - they didn't mean much to me, but Kenny was

33 interested because he had been following it through.

34 Q. Was Kenny taking notes.

35 A. Kenny took notes and didn't pressure Doug with the

36 cameras for a long time and just sat there. When Kenny

37 wasn't there, I pointed out to Doug that I thought that

38 might be okay after all. He seemed too nice to be from

1 the press really.

2 Q. Was it about this time that Doug asked Kenny for money;
3 in other words -

4 A. Yes. He sat there for quite a while taking notes and
5 things and Doug -

6 Q. Was this before the filming.

7 A. A long time before the filming. We had sat there for
8 quite a while. Kenny was running around a bit trying to
9 organise some food - he had, obviously hadn't eaten and
10 it was 9 o'clock or even later by that stage. He was
11 starting to get hungry. I went back to the table and
12 was present when Doug said that all day he'd been
13 worried about having no money and he asked Kenny 'Is
14 there any chance of getting anything?'. And Kenny was
15 wondering 'What the hell was he on about?', and said
16 'What do you mean?'. He said 'Any chance of getting
17 any money?'. And Kenny just said 'Right, look, stop
18 right here before we go any further. I'm not interested
19 in talking to you at all if you think I'm going to give
20 you money for a story, right. We'll call it off right
21 now'. Doug said that he didn't want any money for a
22 story, but he was worried about the fact that he had \$5
23 in his pocket and he didn't know where he was going to
24 stay the night and he was worried about his future; that
25 he's over here and out on a limb and about to go further
26 out on a limb and is there any chance of, you know,
27 getting anything. Well, at that stage, Kenny was almost
28 about to leave, I think, and we found out from Doug that
29 Doug wasn't after thousands of dollars, which is what
30 Kenny seemed to think, and all he wanted was enough
31 money so he could get somewhere to stay the night.

32 Q. And Doug said that about the money.

33 A. Yes. He told Kenny that he wanted to do the story and
34 he wants to give him the story and all he wanted is
35 something to look after him. He asked me at one stage
36 to give him some money and I told him at that stage I
37 hadn't got any, I hadn't come prepared for any - and not
38 that I would have given him any anyway. Kenny told the

1 guy that he clearly was not going to give him any money
2 for any story. That if he had to stay the night, he
3 would see that he was okay. But if he thought he was
4 going to get anything, forget it, call the whole thing
5 off.

6 Q. As a result of all of that, what happened then; in the
7 end, what was resolved about the question of money.

8 A. Well, this went on for a little while. Kenny wanted to
9 make sure that the guy was absolutely certain that there
10 was no question of being paid for a story. He said that
11 it wouldn't be worth, you know, a crumpet if there was
12 payment involved. He wanted nothing to do with it. It
13 was resolved at the end of the night that he would get
14 him something to make sure he's okay for the night, and
15 that was it.

16 Q. By that time, he had cigarettes; you'd bought them for
17 him, hadn't you.

18 A. Yes.

19 Q. When you were in the course of this meeting before the
20 cameras were turned on, as it were, did you have any
21 drinks, the group of you.

22 A. I would think from the time we arrived at the Appollon
23 Motel until the time we left, there would have, could
24 have only been a total of three stubbies per person. I
25 think Kenny might have had one, his cameraman didn't
26 have any - he was made to be the driver - and I know for
27 a fact when we left, the last lot on the table was still
28 half to two-thirds full. Once the camera bits started,
29 the drinks were just left, the whole table was left, the
30 pizza we ordered to eat was just mostly left because we
31 were filming.

32 Q. So, you mean by that three rounds of drinks in your
33 estimate, do you.

34 A. In the entire evening, there would have been a total of
35 three stubbies consumed. Are you referring mainly to
36 Doug, I suppose?

37 Q. Yes.

38 A. He could have had three stubbies brought for him, of

1 which he would've only been able to have two and a half
2 as there was half to two-thirds of that left in the
3 bottle.

4 Q. What about you, did you drink the same amount.

5 A. I had probably the same amount. I thought it would be
6 only fair as Channel 10 were picking up the tab.

7 Q. And Chris Kenny the same.

8 A. I think Chris probably would have had one. He may have
9 had more than one but the one he had was left, the
10 remaining half, as he was running around doing things.

11 Q. So, were you there then when the cameras started up.

12 A. Yes. I was there from the time the guy sets the lights
13 to the time that he packed it up virtually.

14 Q. Were you wearing a jacket with some sort of National
15 Parks and Wild Life emblem on it.

16 A. That was a supermarket jacket that had an emblem on it.

17 I've looked at it since. It has a mountain in the
18 middle with snow and a moose on it and it does say
19 'District Ranger Wilderness Parks'. No, it wasn't a
20 National Parks' jacket.

21 CONTINUED

1 Q. You, of course, were not on the television, were you.

2 A. No, Doug asked if I wanted - I think, at this stage - or
3 Chris Kenny said 'Do you want to be on it?' And I said
4 'I have been too highly profiled on this already.
5 Somebody is going to make mileage out of it. It is not
6 going to be me. Someone is made to be a bad egg out of
7 this. I want a low profile. Right out of it.' It
8 didn't work, did it?

9 Q. I take you to the topic of the letter to Mr Tickner.

10 You have already told us that you had a hand in
11 preparing such a letter and sending it off to Mr
12 Tickner, that's correct, isn't it.

13 A. Yes.

14 Q. Was there any conversation - can you tell us when the
15 first discussion of a letter to Mr Tickner occurred.

16 A. Doug thought he not only wanted to tell the press, he
17 wanted to let Tickner know. Because, if it wasn't for
18 Tickner, we wouldn't have had the problem, in the first
19 place. So, we had to inform Tickner that he was
20 involved and perhaps Tickner would, you know, see the
21 error of his ways. It was first discussed about the
22 same time briefly as getting the press in the first
23 place. Then, once we were at the Appollon Motel, he
24 said 'Well, let's prepare this letter for Robert
25 Tickner.'

26 Q. It had been discussed at the Middleton Tavern, had it.

27 A. Yes, just briefly, that he wanted to prepare a letter
28 and get it off. And, at that stage, I just put it in
29 the too-hard-basket.

30 Q. Was that his idea, the letter to Tickner.

31 A. Yes.

32 Q. You got to the Appollon Motel. When did that arise
33 again, then.

34 A. I - during the course of the time that he was talking to
35 Kenny, Kenny was writing down all this stuff, Doug was
36 repeating the same stuff as I heard in the first place
37 and I heard with Chapman. Then I heard with Kenny. So,
38 I had it drummed into me fairly well by then what his

1 grievances were. Who was involved. And what he wanted.
2 He told me he wanted this letter and so, could I prepare
3 a letter for him? And I just started writing down all
4 the things on a - just a foolscap page. What he had
5 indicated to me and who he wanted to send it to.

6 Q. At the top of p.12 of your statement, you indicate that
7 initially you indicated that that would have to be left
8 until tomorrow, is that right.

9 A. I felt that we would have to - you know, if he was going
10 to send a letter off to Robert Tickner, it would have to
11 be more than a thumbnail dipped in tar. So, I told that
12 I thought we would probably have to leave it until
13 tomorrow to get it all typed up and sent off, but I went
14 out while he was doing something with Chris Kenny. I
15 just went out to the foyer area.

16 Q. What was his reaction to that suggestion, incidentally.

17 A. He couldn't see why he couldn't just sign my rough notes
18 and send them off.

19 Q. Go on. Whilst the TV interview was -

20 A. While they were setting something up or doing something,
21 I just went out to the girl at the desk and I said `Have
22 you got a typewriter there?' It was fairly late by then
23 and, fortunately, she was still at the desk. And she
24 said `Yeah, I have got a typewriter.' I told her I
25 wasn't much of a typist and she said `I'll type it for
26 you.' So, I just went and got my notes again and came
27 back and she had the typewriter set up and just typed
28 out exactly what I, you know, gave her on the piece of
29 paper.

30 Q. Looking at this letter produced to you, and it is in
31 rough, isn't it, is that the letter.

32 A. That is my writing and that's rough. This is the
33 original letter that I prepared for Doug at his request
34 from information that he gave me. And it is the letter
35 that I took out to the receptionist. And it has still
36 got her writing on it. The letter is now history. You
37 know, I mean, it has been sent all over the place. The
38 only things that she actually - she just did as she was

- 1 - just typed it up. She had no input, other than
2 changing some of the spelling on it and they are noted.
3 That is here. Her writing is in here. And the only
4 conversation she and I had, other than the letter, was
5 how we were going to send a copy to - Doug wanted a copy
6 to go to the Aboriginal Affairs in - to Robert Tickner
7 and also to the Premier and the Aboriginal Affairs,
8 Armitage.
- 9 Q. Here, in this State.
- 10 A. Here, in this State. Our major drama was how to set the
11 letter out and how to spell Armitage.
- 12 Q. Looking at the letter there in front of you, that was
13 penned by you at what stage in these events.
- 14 A. At the same time as he was relaying virtually exactly
15 the same information to Chris Kenny. As I said, a lot
16 of it I had heard before.
- 17 Q. Before the filming.
- 18 A. Yes, during the day, he had told me the same stuff and
19 this was what he wanted to -
- 20 Q. When I said 'before the filming', I meant, you were
21 writing it at the table in the Appollon Motel, were you.
- 22 A. Doug was there (INDICATES), I was here (INDICATES), and
23 Kenny was either talking to his cameraman, or there.
24 Doug was present. I mean, two foot away, while I was
25 writing it and I was asking him, you know, 'Is that what
26 you want?', or 'Is that right?'
- 27 Q. The letter speaks for itself, I know, but, just to
28 explain it, up the top, at the very top, there is
29 'Kumarangk' printed out.
- 30 A. That is -
- 31 Q. Whose writing is that.
- 32 A. That is my writing. In the letter down further we have
33 got - he mentioned the Kumarangk - Friends of Kumarangk
34 had influenced him and what have you. Well, I didn't
35 know how to spell Kumarangk, so we had a little bit of
36 an experiment up the top and picked the one that looked
37 the best. And the same with Armitage, at the bottom.
- 38 Q. Whose writing is that, 'Kumarangk'.

- 1 A. That is my writing. It is all my writing, other than I
2 think the woman from the Appollon might have put 'Hon'
3 in front of Robert Tickner, to make him Honourable. I
4 would have left that out. And Binalong is mentioned.
5 She couldn't read my writing. And she has put Doug's
6 name at the bottom. The correct way to set the letter
7 out.
- 8 Q. Just read it for us, so that we can make sure we are
9 translating your writing correctly. 'Dear Minister',
10 etc.
- 11 A. 'Dear Minister, I, Doug Milera, feel that the steps
12 taken by Binalong Company Limited in their environmental
13 impact statement', I just put 'EIS', 'for the marina at
14 Goolwa regarding Aboriginal issues was fair and correct.
15 The right people were consulted, at the time. And, in
16 my opinion, the bridge can go ahead. I feel I have been
17 used by others to further their causes and not our
18 cause. People we considered to be our friends,
19 unionists, The Friends of Kumarangk and other bridge
20 protestors, used my Aboriginal heritage for the purpose
21 of stopping a project that they were unsuccessful at
22 stopping. My wife and I were swept along with the
23 current and we got in so deep, it was hard to get out
24 again. Now is the time to speak out and I feel the
25 bridge would be a good thing for the whole community,
26 both blacks and whites, and the bridge would do more for
27 reconciliation than what the Government is doing.' Then
28 'Doug Milera', and the copies.
- 29 Q. And then you have got, have you, 'Copies to Honourable
30 Dean Brown, Premier of South Australia, Dr Michael
31 Armitage, Minister for Aboriginal affairs S.A.'
- 32 A. Yes.
- 33 Q. And then you have had a couple of tries at spelling
34 Armitage, is that what has happened.
- 35 A. Yes, several tries at Armitage. We had 'AGE', 'IGE',
36 every sort.
- 37 Q. That letter was composed in the conference room at the
38 table, was it, by you.

- 1 A. Yes, the whole lot was done there. The only thing that
2 was done out at the office where the girl was was she
3 added what my abbreviations were down at the bottom of
4 Aboriginal Affairs, Binalong and Doug Milera, where it
5 was to be signed. I just went through - you can see
6 here I have crossed out writing that she couldn't read
7 and rewrote it.
- 8 Q. You took that letter out and it was typed up by the
9 receptionist at the Appollon Motel.
- 10 A. Yes.
- 11 Q. You kept a copy of this letter, didn't you, the typed
12 version.
- 13 A. What she typed up, I just photocopied.
- 14 Q. Looking at this photocopy produced to you, dated 6 June
15 and with a copy signature there, is that the letter that
16 was typed up by the receptionist at the Appollon Motel.
- 17 A. Yes, that's correct.
- 18 Q. It is a copy, indeed, is it not. It is not the -
- 19 A. No, it is a photocopy.
- 20 Q. It is a photocopy.
- 21 A. Yes.
- 22 Q. And the signature there, above the name Doug Milera, is
23 that his signature, did you see -
- 24 A. I wouldn't know his signature, but I watched him sign
25 it. In fact, he signed it in front of the TV.
- 26 Q. The receptionist from your rough letter typed this
27 letter up.
- 28 A. Yes.
- 29 Q. Just produced to you.
- 30 A. Yes.
- 31 Q. And, it having been typed up, what did you do with it
32 then.
- 33 A. I thanked her very much, because I thought it was a bit
34 beyond the call of duty, at that time of night, to type
35 it out. I indicated to her that it was confidential and
36 that she would have to shoot herself before she went
37 home. Just joking. So, that was the end of it. I
38 don't think I saw her again. We took it back in to

K.D. DENVER XN (MR SMITH)

1 where Doug and Kenny were and I sat back down at the
2 table. I think, from memory, Doug was standing. I said
3 'Well, this looks better than my copy that - here in the
4 biro. What do you reckon?' And 'Is there anything else
5 you want?' I didn't want him to may be go out and get
6 her to redo it again really, but I said 'Is there
7 anything you want changed, added, taken out?' He read
8 it through and he said 'No, that's exactly what I want.'
9 And then he read it through again and then he said
10 'Look, I think you should leave out this part about the
11 unionists, because they have had a great deal of
12 involvement. If I mention them, there is no way I am
13 going to be able to cuddle up to them again and find out
14 more information about what they have been up to.' Then
15 he said 'Once they see the rest of the the letter, they
16 will shut up anyway and we will leave it in, so, I'll
17 sign it.' At that stage, he grabbed a pen and was about
18 to sign it and Chris Kenny asked if he would just wait
19 for a second, until the cameraman was there.

20 Q. The signing of that letter was actually on camera,
21 wasn't it.

22 A. Yes, Doug - in the meantime, the cameraman got set up.
23 Of course, they like the right sort of light and this
24 sort of guff and Doug had hold of the letter and he was
25 obviously going through it several times. The guy said
26 he was right, so I witnessed it, Chris Kenny and the
27 cameraman and I think everybody in Australia, because it
28 was on TV.

29 EXHIBIT 61 Rough draft and typed version of letter
30 to Minister for Aboriginal Affairs,
31 Robert Tickner, dated 6 June 1995,
32 together tendered by Mr Smith.
33 Admitted.

34 Q. That letter is dated 6 June 1995, and we have been
35 talking of this day being 5 June, have we not.

36 A. The girl said - and I don't know what time it was. Half
37 past 10 or whatever at night - she would put tomorrow's
38 date on it, 'Because it is not going to get anywhere

K.D. DENVER XN (MR SMITH)

1 tonight, is it?' I was going to fax it from their
2 machine, but, of course, didn't know what any fax
3 numbers were. And, so, we said we would fix it in the
4 morning. So, she just put - this is the way it
5 happened. Just put tomorrow's date on it.

6 EXHIBIT 62 Telephone account documents tendered by
7 Mr Smith. Admitted.

8 Q. Did you indeed fax that letter off.

9 A. I had a lot happening the next day. I didn't get home
10 until midnight and I arranged for somebody else, not
11 really being up with this world of business and faxing
12 stuff, I thought you would probably have to fax people
13 when they are open and what have you. I got somebody
14 else to take it into the local business supply place
15 with a fax machine and fax it for me. And, so, I didn't
16 personally fax it. It was somebody that I trusted that
17 did it.

18 Q. The name of that business, do you remember it, offhand,
19 from where it was faxed.

20 A. I think it was called Encounter Coast Business Supplies
21 or South Coast Business Supplies.

22 Q. Is that at Victor Harbor or Goolwa.

23 A. No, in the main street in Goolwa.

24 Q. The signing of that letter, Exhibit 61, the typewritten
25 part of that exhibit, was that towards the end of the
26 evening that that was done.

27 A. The signing of the letter was virtually that was it for
28 the evening. We just chatted briefly afterwards. He
29 said he was glad to have - Doug said that he was glad
30 that he had, you know, done all that and that it was all
31 fixed up. The cameraman was starting to pack his gear
32 up and so we left. By then I think the reception had
33 more or less shut down and the front door. We had to go
34 out a back entrance or a back door. The cameraman was
35 left to cart all his stuff away and we went around to
36 the main street. Kenny wanted to - because Doug once
37 again mentioned, you know, where is he going to stay the
38 night? Kenny said he could stay in the motel, if he

K.D. DENVER XN (MR SMITH)

1 wanted to. He indicated again that he didn't want to
2 stay there, he wanted to stay somewhere else. So, we
3 went down to the main street, in my car, Kenny, Doug and
4 myself, to look for a ATM machine, which I only know
5 where mine - the one for my bank, not where their bank
6 was. So, we just drove down the street, until we found
7 it. Kenny got some money out of the machine, or
8 whatever, and got back in the car and we asked Doug
9 where he wanted to go. He indicated that he would like
10 to go to the Hotel Crown in Victor Harbor. So, we just
11 - at that time of the night, I could have any space I
12 wanted, I just parked right out the front of their
13 entrance and Doug got out of the car and he said `Can
14 you come in and book me in?', to Chris Kenny. He said
15 that, you know, they would probably be hesitant about
16 giving an old black fellow a room, at that time of the
17 time. And we just looked at each other and Kenny
18 thought he would do the right thing and he went in there
19 with him. And I think they were more interested in
20 running the poker machines than their rooms, because
21 there was no apparent staff or whatever. They both came
22 out again and got back in my car. They took off round
23 the corner to try and find another door and then they
24 got back in and we went down to the Grosvenor Hotel. It
25 was - we had to go around the back, it is a one way
26 street, to the Grosvenor Hotel, where Doug said that he
27 would be happy there. Got out. Stayed the night. And
28 Chris Kenny gave him money for the thing. Chris Kenny
29 got back in the car and I said to him `Well, I hope you
30 didn't give him much, because he looks like he will
31 probably blow it all tonight. I think it was probably
32 better to give him some now and some later.'
33 Unfortunately, I thought he would blow the whole lot.
34 CONTINUED

K.D. DENVER XN (MR SMITH)

1 Kenny once again said he didn't want to give him
2 anything, but he didn't want the poor bastard to be on
3 the streets, so he -

4 Q. Do you know how much he gave him.

5 A. I've got no idea how much he gave him. I thought it was
6 \$50 or \$100. Since then I've heard the press say it was
7 \$200, but I wasn't aware. I didn't count it. It was
8 nothing to do with me.

9 Q. What time of night are we talking about now.

10 A. 11.30 at night.

11 Q. Did Doug Milera actually go into the Grosvenor Hotel.

12 A. Yes, he just went in and we left. I was getting a bit
13 edgy by then because it was certainly a long day for me.

14 Q. Did you take Chris Kenny then back up to the Appollon,
15 did you.

16 A. We went back to the Appollon which, once again, being a
17 one way street, we had to go round a few corners to get
18 back to the Appollon, and we again discussed the fact
19 that he didn't want to give the guy any money but, as I
20 said before, he just didn't want the guy to have to
21 sleep in the street.

22 Q. By 11.30 at night, what was Doug Milera's condition in
23 terms of sobriety.

24 A. Doug gives the impression to the casual observer that he
25 is drunk all the time. It is just the way the guy comes
26 across. If you look at the film footage, he doesn't
27 seem any more sober at the beginning than he does at the
28 end of the night. As far as I was concerned, he was
29 quite fine. I asked him if he was all right. He just
30 wanted me to go with him everywhere. I couldn't leave.
31 I was trying to get out of the place from about the time
32 I arrived at 2.30 till about - but as far as I was
33 concerned he was quite sober, but I drove.

34 Q. Looking at your telephone records, Exhibit 62, your next
35 contact with Doug Milera was when.

36 A. It was in fact - I thought that would be the last I
37 would hear of everybody, because it was fairly major in
38 the press. I managed to keep right out of it, like I

K.D. DENVER XN (MR SMITH)

- 1 indicated. I thought that would be it. But Doug, on
2 the 8th, which was only two days after the letter was
3 faxed, phoned me.
- 4 Q. Just to get things in perspective, the television
5 program which featured the meeting at the Appollon Motel
6 was on television on the evening of the 6th on the
7 Channel 10 News, is that right.
- 8 A. On the evening of the 6th it had - I think that day they
9 had Sarah Milera on the front page of the paper, and
10 then they had Doug that night, and neither of them knew
11 what each one was up to, both coming out with the same
12 story. I thought 'Whacko, this is the end of that and
13 that was the end of me', but -
- 14 Q. Just pause for a minute there. Looking at Exhibit 24,
15 that is the front page of the 'Advertiser' of 7th June.
- 16 A. That's correct.
- 17 Q. That's the article entitled 'The Great Lie of Hindmarsh
18 Island'. Is that the one you mentioned then.
- 19 A. Yes.
- 20 Q. Is that when Sarah had come out and said something.
- 21 A. Yes, which would be the day after, but she must have
22 done this the same time as the other.
- 23 Q. Did you see the actual to-air footage of what went on in
24 the Appollon Motel.
- 25 A. Yes, yes.
- 26 Q. That was, indeed, on Tuesday, 6 June, was it. Tuesday
27 night, 6 June.
- 28 A. Yes.
- 29 Q. Then you saw this article 'The Great Lie of Hindmarsh
30 Island' in the 'Advertiser' of 7th June.
- 31 A. 7th June, and thought if the two were tied together it
32 would be great.
- 33 Q. So your next contact with Douglas Milera was with that
34 background in mind, wasn't it.
- 35 A. With that background in mind. I had seen Doug on the
36 television and I had seen Sarah in the paper. The next
37 day after that, I was in a vehicle that must have had a
38 radio, and I heard Murray Nicholl on the ABC

K.D. DENVER XN (MR SMITH)

1 interviewing Sarah about this, and that was - I think
2 that's when Sarah said that 'Colin James has got it all
3 wrong and that's not what I wanted to say anyway', or
4 something like that.

5 Q. So on 8th June at about 1.22 p.m. there was a reverse
6 charges call to you from Wellington. Is that right.

7 A. Yes. Doug mightn't have had much money, but he knew how
8 to make things work. He reverse charged a call to me,
9 so that is why I have got that exact record.

10 Q. You had a conversation with him.

11 A. Yes.

12 Q. Your telephone account bill shows that, does it not.

13 A. Yes. It is listed on my home one as 8 June, 1.10 p.m.
14 Wellington, 12 minute phone call, reverse charge.

15 Q. Tell us what was said.

16 A. Doug rang up and I asked him 'Whatever has happened?'
17 after he had spoken to Channel 10. Well, he had got
18 himself to Wellington. I said 'What the hell's gone on
19 with Sarah? One minute she is on the front page of the
20 "Advertiser" and I think whacko it's Christmas, and the
21 next day she's on the radio saying "It's not true, I
22 didn't want to say that at all". What's happened?
23 What's going on?' I asked Doug straight out 'Has she
24 been got at? Who has nobbled her? She's been got at.'
25 Doug said that yes, they have been got at. 'Sarah's
26 been influenced'. I said 'Why?' Doug indicated to me
27 that they were very close - they had been close as a
28 family, and he had a son that was working for Victor
29 Wilson - who still didn't mean anything to me - and
30 indicated the fact that if their son wanted to retain
31 his job, both Sarah and Doug better start towing the
32 line. So Doug told me the only reason that Sarah
33 changed her story about what was on the front page of
34 the Advertiser, was the fact that they were being
35 pressured and family pressures and whatever.

36 Q. How did that call end up then.

37 A. Doug really wanted me to talk to Sarah, to get Sarah
38 straightened out. To tell her 'Don't take any notice of

1 Victor Wilson.' Could I help? What could I do? I said
2 `How am I going to be able to help? I am on the
3 opposite camp. They are not going to listen to me.'
4 Doug left me - as is written on the message there, he
5 has left me with a phone contact for where he is and
6 where he was likely to be. If I thought of some way of
7 fixing the situation, to call him back. Well, I never
8 called back.

9 Q. You've indicated you left that in your message book.

10 A. Yes.

11 Q. Looking at your message book -

12 A. I've written here on my message book, on this tear-out
13 tab thing, the time of the call, which corresponds with
14 the reverse charge anyway, and it makes note of the fact
15 that his son works for Victor Wilson, they're worried
16 about his job, and the two phone numbers where to
17 contact him, and the date.

18 Q. You made no further contact, I think, until another
19 reverse charges call, is that right.

20 A. Yes. I really didn't like the way things were going, so
21 I wasn't going to go tracking him down. I also was
22 trying to run my own life. Doug phoned me back, a
23 reverse charge call, about 1 p.m. on 17 June. He was
24 quite worried about the way things were going, that they
25 were making him look bad in the press. He reiterated
26 what he said was not bullshit. He was going to stick by
27 his story. He wasn't going to change his story, but he
28 felt that he needed some help. By that, he meant
29 perhaps a lawyer. I asked him `What about the
30 Aboriginal side? What about ATSIC?' He told me one of
31 his favourite sayings `ATSIC weren't worth shit'. He
32 said that ATSIC will pay for anybody and anything that
33 has their point of view, but because he had a different
34 point of view they weren't interested in him.

35 Q. Was the topic of people getting at him raised in that
36 phone call, as you've indicated in your statement there.

37 A. Yes. He indicated to me that he was going to stick by
38 his story. He wasn't going to change his story, but he

K.D. DENVER XN (MR SMITH)

- 1 said the bastards were trying to get at him. I was
2 worried that - I saw what had happened, and he told me
3 earlier what happened with Sarah. I thought 'It's only
4 a matter of time before his story is changed'. The
5 press were trying to make out that he was drunk and
6 Kenny had paid him and everything, and I thought it was
7 only a matter of time before it's turned around.
- 8 Q. You say there in your statement 'He was not going to
9 change it, although these bastards were trying to get at
10 him'.
- 11 A. That's right.
- 12 Q. Did he nominate who these bastards were.
- 13 A. No, just general bastards.
- 14 Q. That was a short telephone call, you say there.
- 15 A. Yes. Once again, it was from Adelaide. He said he was
16 in town. It was a short call. I was paying and I was
17 busy so I kept it short.
- 18 Q. I think the next occasion you or your family had contact
19 from Doug Milera was on 27 June. Is that right.
- 20 A. Yes. Doug rang, my wife took a message, which is in
21 here.
- 22 Q. Would you indicate that, please.
- 23 A. That's the one where he rang from the reverse charge
24 that we just talked about, to say it wasn't bullshit and
25 he wasn't going to change his mind. 27th June 1995. My
26 wife took a message at 2.58 'Doug Milera rang and he'll
27 ring back tonight'.
- 28 Q. When did he ring back.
- 29 A. He in fact rang back the next evening, which was the
30 28th June. Doug once again rang my wife, and she gave
31 Doug my mobile phone number and said 'Talk to him
32 yourself'. Doug rang my wife back again some minutes
33 later and said, because he was living in a house with an
34 STD barred phone, he couldn't ring me on the mobile,
35 could I ring him. So my wife rang me. At this time I
36 was actually at Tom and Wendy Chapmans' house. I
37 haven't got a computer. I was preparing something on
38 their computer, and I asked Wendy or Tom 'Can I use your

1 phone?' It's a phone call to Doug Milera, is it okay?'

2 Q. That was a call back to Adelaide, was it, then.

3 A. No. He was to his house in Goolwa.

4 Q. Did you know where that house was.

5 A. Well, I knew it was in Saxton Street because I nearly
6 turned into it, but I didn't know where or what number.

7 Q. In the initial part of the conversation, I think he
8 asked you if you would come around to his place. Is
9 that right.

10 A. Yes. Doug asked me if I could come in and see him -
11 come round to his place. I was fairly busy and I had
12 been trapped once before, as you recall, from 2.30 to
13 11.30, so I told Doug that I couldn't. I said I was
14 ringing him from Adelaide, I was at a meeting and I was
15 tied up. I was trying to make him short, sharp and
16 shiny, so he would let me get back to what I was doing.

17 Q. Of course, that wasn't true. You were at the Chapmans'
18 house on Hindmarsh Island.

19 A. Yes.

20 Q. You then settled down to have, what turned out to be, a
21 very long conversation with him. Is that right.

22 A. I hadn't known it was going to be that, but it took over
23 an hour.

24 Q. Was there, at the beginning of this conversation, raised
25 a topic relating to keeping a record of it.

26 A. Yes. Doug was worried. He indicated to me previously
27 that they were trying to get at him, and he wanted to
28 tell me anything else he thought might be relevant, and
29 could I keep a record of it. He asked me - we were just
30 talking on a closed line. The Chapmans had guests at
31 that stage, and they had just disappeared and left me.
32 Frankly, once again, I think they were paranoid to be in
33 the room where the phone was in case it was subject to
34 anything in the future.

35 Q. So, getting back to the topic you were discussing, Doug
36 wanted you to keep a record of it.

37 A. Yes.

38 Q. Tell us what was said.

K.D. DENVER XN (MR SMITH)

- 1 A. He asked me, during the conversation, probably every
2 minute or two 'You got that? You got that?' To check
3 that I'd been recording it, writing it down or whatever,
4 to have anything that he said that might be relevant.
- 5 Q. At the beginning though, was that topic ventilated.
- 6 A. Yes, and all the way through.
- 7 Q. Tell us, as near as you can, what it was he said to you
8 on that topic, that is, the topic of keeping a record of
9 the conversation.
- 10 A. He wanted me to take everything down, make sure I had
11 everything. He just repeated it over and over, as I
12 just said.
- 13 Q. You were in a room in the Chapmans' house, I take it.
- 14 A. Yes. I was in a room in their house and they
15 high-tailed out of it.
- 16 Q. Was it an office or something, was it.
- 17 A. No. It is a section of their living room that they had
18 a computer terminal in one end and I - because Doug
19 wanted to keep a record, I thought 'I'll just write down
20 - he might waffle for a bit and I might get one or two
21 little juicy bits and that would be it'. The
22 conversation was taking a fair while, and he kept saying
23 'Have you got that down?' One of the house guests at
24 the time - I said 'He wants me to record all this. I
25 need to take this all down'. What happened, she said
26 'Look, I can do that shorthand' or script, whatever it
27 is 'I haven't done it for a long time'. I put it on
28 speaker phone so as she could copy it down. So every
29 time Doug said 'Have you got that?' I could say 'Yeah,
30 we're getting it.'
- 31 Q. That went on for a little while, didn't it, with her
32 taking this down.
- 33 A. Yes. She indicated that - he's very difficult to
34 understand, if you have never spoken to him before
35 anyway. She was having a lot of trouble. She hadn't
36 done it for 25 years or what have you. Because I had it
37 on the speaker phone, the Chapmans were off out the
38 door. They knew that he wanted me to record it, and

- 1 some time very soon afterwards, Tom Chapman returned
2 with a tape recorder type thing. So she continued to
3 script and I said `Right, we've got it all now on tape'.
4 Q. Can you tell me whether Milera knew specifically that
5 you were using a tape recorder.
6 A. I'm fairly sure that he should have known. I told him
7 that and we obviously - it was one of those little
8 things, so during the course of the evening we had to
9 change the tape several times. I thought, once again,
10 `Time goes when you're with Doug'. And we used three
11 tapes.
12 CONTINUED

1 Q. You used three tapes.

2 A. Three of those little tape things.

3 Q. When you were changing the tapes, did you tell him you
4 were doing that.

5 A. Well, it would be on the tape if I told him. It was
6 pretty obvious. We made a hell of a lot of clatter and
7 bang. I didn't know how it worked. It was one of those
8 a dictaphone type of thing and the other woman, we
9 continued on with the conversation and any bit that's
10 not on tape is written, but it's only a matter of a few
11 seconds anyway, a minute.

12 Q. You have listened and the conversation continued. What
13 sort of period of time, can you tell us that.

14 A. Well, we probably spoke for five or ten minutes before I
15 decided that I'd oblige by recording what he was telling
16 me, because it started to get more interesting. The
17 woman must have gone for five or ten minutes before we
18 got organised with the tape, and the tape has gone for
19 about an hour. I haven't timed it.

20 Q. There are three of those mini cassette tapes.

21 A. Yes.

22 Q. You have played those tapes back to yourself many times,
23 I think; is that correct.

24 A. Well, a couple of times, yes.

25 Q. I think you actually made a transcription of what is on
26 the tapes; is that so.

27 A. Yes, that's correct. Because we had the tape and we had
28 this script stuff, the woman was having trouble reading
29 her own script. We both sat down and we worked out what
30 was said and played the tape back and just typed it up,
31 so we knew what was on it.

32 Q. You checked through the transcript as against the tape
33 after you had done it.

34 A. Yes. I obviously - there were a lot of things, little
35 things, that were - we left out some of the more choice
36 language, some of the - like me saying `Yeah', yeah,
37 yeah'. That wasn't in on it. It's obviously on the
38 tape.

- 1 Q. In broad terms, the topic of conversation between the
2 two of you on this occasion was what, without going into
3 detail.
- 4 A. Well, his story was correct. He wasn't going to change
5 his story no matter what. He was frightened he was
6 going to be nobbled and wanted me to know everything
7 that happened and who was involved as much as possible.
8 The fact that he was really embarrassed that Chris Kenny
9 had been made to look bad. The press had a field day;
10 they really took the bloke apart. He was upset about
11 that. He covered - I mean, I came out smelling a bit
12 too.
- 13 Q. The transcript of the tapes sets all that out.
- 14 A. Yes. And he goes through there and says that, you know,
15 Kenny didn't pay him, he said that I didn't pay him and
16 the Chapmans didn't pay him, and dobs in a few people
17 for their involvement, and that's about it. It's not
18 really anything to do - there's not much other than the
19 fact that he was involved in fabricating it. He doesn't
20 refer to anything that - it's not my decision that we
21 say whether it is or isn't - is to do with women's
22 business anyway.
- 23 Q. Can you tell us where you stayed last night.
- 24 A. Yes, I stayed in Adelaide.
- 25 Q. Whose place did you stay in.
- 26 A. The press will love this: I stayed at one of the
27 Chapman's, or both the Chapmans' daughters' place.
- 28 Q. Did you have a bit of difficulty -
- 29 A. It's no secret.
- 30 Q. Had a bit of difficulty leaving this morning, did you.
- 31 A. Yes. I had - one of the TV stations must have found out
32 that and though it would be a bit juicy, some link
33 there. But let them have a go. There's no links. It's
34 a convenient place to stay. I wasn't aware they would
35 keep me here for day on end.
- 36 Q. I think you transferred from your three mini cassette
37 tapes the tape recorded conversation onto a larger tape;
38 is that right.

1 A. Yes, I didn't have a player that played the little ones.
2 I borrowed one played and put it onto the bigger one to
3 play it back to see what it said, and that's it.

4 Q. Looking at that cassette produced to you, do you
5 recognise that as -

6 A. That's the one that -

7 Q. That's where the mini cassettes were transferred onto.

8 A. Yes. Actually, it's the one that's prepared for here,
9 but I've seen that when it came back. It's definitely
10 the one.

11 Q. We have in that plastic envelope two mini cassettes. Do
12 you recognise that.

13 A. That is written on it. It's got two sides of one and
14 one of the other and three sides of that and put onto
15 the one.

16 Q. You had better look at that ordinary cassette produced.

17 A. Yes, that's got my writing on it and says `Doug'.

18 Q. When I say three tapes, there are two tapes with three
19 sides and this one has one and a bit sides and now that
20 is on that one which is three.

21 MFI 63 Two small mini cassettes marked 63
22 for identification.

23 MFI 64 Large cassette tape marked 64 for
24 identification.

25 EXHIBIT 65 Copies of telephone attendance notebook
26 tendered by Mr Smith. Admitted.

27 MR ABBOTT PRODUCES A PHOTOGRAPH OF MUNDOO ISLAND TO MR
28 SMITH AND ASKS THAT THE WITNESS BE ASKED WHETHER HE
29 IDENTIFIES IT AS A RESIDENT OF HINDMARSH ISLAND.

30 Q. Looking at this copy of a photograph produced to you, do
31 you recognise that.

32 A. It's a dreadful photograph.

33 MR ABBOTT: It's an old one.

34 A. Yes, I recognise that photograph. All the right-hand
35 portion, virtually as far as you can see, is my
36 property. There's the Mundoo barrage and the old bridge
37 which had been there before the turn of the century, the
38 bridge that linked Mundoo Island to Hindmarsh Island.

1 XN

2 Q. Is that as things are today.

3 A. Yes. Originally, there were bridges there. That's why
4 it's a bit hard to understand now. This was the old
5 bridge that they put gates on it. (INDICATES).

6 Q. Perhaps if you hold up and indicate to the Commissioner
7 first of all.

8 A. You need a little bit of imagination. This here is an
9 embankment and there, on there, there is a - this is my
10 property here (INDICATES). This is - there's a causeway
11 or an old wooden structure here that was originally a
12 barrage. They had gates on about 1914, '17, or
13 whatever, and the guys from Renmark were frightened the
14 river was going to flood and dynamited the gates off it
15 and blew it to pieces. That remained as a bridge but
16 not as a barrage until about 1954 when a front-end
17 loader fell through it. That was it. In the mid-30s,
18 they constructed the whole barrage network.

19 COMSR

20 Q. Are you speaking from personal knowledge.

21 A. I lived here and my house is here.

22 Q. You are talking about the 1930s now.

23 A. The new barrages were built in the 1930s. That is a
24 fact, '36 or something. The Mundoo barrage is there.
25 It is a concrete structure that separates the fresh
26 water from the salt water. I'm fairly familiar with it.
27 It's my land on the salt water side and the fresh water
28 I'd -

29 COMSR: The witness is saying that the barrage
30 was there, and just for the present I suppose at some
31 stage the witness will be asked questions concerning
32 that photograph. Do you want to -

33 MR ABBOTT: I invite my learned friend to tender it.

34 XN

35 Q. First, if you mark the two barrages there by putting one
36 of those small yellow stickers on it with an arrow.

37 A. We called the old one the old barrage, the old barrage,
38 and the new one the new one, even though it's been there

1 since the '30s. If this was a clearer photo, back here
2 you've got the Goolwa barrage. (INDICATES).

3 Q. Just indicate the Goolwa barrage.

4 WITNESS MARKS PHOTOGRAPH

5 Q. Just to orientate everybody if you could, what end of
6 the island are we looking at, where is Goolwa, where is
7 the sea, where is Mundoo Island.

8 A. That is the sky. That's the sea. Here is the Murray
9 Mouth. This is what is today called the Mundoo channel
10 and it comes up to the barrage and on this side is the
11 fresh water side and that's Holmes Creek and its on that
12 they built the barrage and it hasn't always been there.
13 That is the main channel. Down or off the photograph is
14 the Goolwa barrage and that's oblique, or whatever you
15 call it, on an angle and you lose it out there, and
16 there's Goolwa there. This is north that way, and that
17 is south that way. (WITNESS INDICATES ON PHOTOGRAPH).

18 Q. You have marked the Mundoo -

19 A. That's the Mundoo barrage, as one sees it is the old
20 bridge which you can hardly see, and over here would be
21 the Goolwa barrage.

22 EXHIBIT 66 Photograph of Mundoo Island tendered by
23 Mr Smith. Admitted.

24 WITNESS STANDS DOWN

25 ADJOURNED 12.35 P.M.

- 1 RESUMING 2.20 P.M.
- 2 MR SMITH: Before the arguments commence, I
3 intended to tender yesterday, but didn't do so, the
4 media releases which I read from and also which were, in
5 any event, going to be tendered generally before you.
6 And I hand out indexes to counsel. And all counsel have
7 copies of that material, in any event. But, just so
8 they know what is in that file, I will hand out quietly
9 behind the scenes here, the indexes to that material.
- 10 MR TILMOUTH: Before you rule on this, could I make
11 the enquiry, what are these being tendered for? And
12 don't they account - if they contain some of the things
13 that Mr Smith read out yesterday, don't they confront
14 exactly the same problem that we have been arguing in
15 the last day or so?
- 16 COMSR: That is, that I can't read the media
17 releases?
- 18 MR TILMOUTH: The media releases in relation to what
19 would infringe s.35.
- 20 COMSR: I take it the media couldn't publish
21 such things either.
- 22 MR TILMOUTH: Not validly under the Act either. That
23 is the point I was making yesterday about the question
24 of divulgence.
- 25 COMSR: I see, anything shown on television or
26 broadcast or published concerning Aboriginal tradition -
- 27 MR TILMOUTH: Not with the knowledge and consent of
28 the Aboriginal people who own the relevant traditions or
29 the beliefs, or have not otherwise been shown to be with
30 the consent, is prima facie -
- 31 COMSR: The consent of whom?
- 32 MR TILMOUTH: The people who own the beliefs or
33 traditions to which they relate.
- 34 COMSR: Before anything can be published, that
35 is, in this hearing room, or over the air, or on
36 television, the publisher must have the consent of the
37 relevant Aboriginal group or person who owns that
38 belief?

1 MR TILMOUTH: Putting it nontechnically, yes, because
2 this is the whole point that has been argued over the
3 last couple of days.

4 COMSR: No, notwithstanding whoever many times
5 something may have been published or shown on
6 television, if it is shown again, it is an offence,
7 unless it is shown, with the consent of the Aboriginal -

8 MR TILMOUTH: In a sense, yes, because it is a blanket
9 prohibition, as Ms Layton has been arguing yesterday and
10 today. Because it is in the public domain, as I put it
11 yesterday, doesn't necessarily demonstrate that it is
12 legitimately in the public domain. Even if it is argued
13 under s.35, sometimes it might be there for one purpose
14 which does not necessarily mean that a later divulgence
15 is free of the constraints of s.35. And the fact of the
16 matter is that it confronts exactly the same problem we
17 have been endeavouring to argue about in the last few
18 days. Quite apart from the fact of the Milera evidence
19 and the question of him being a man. Put that issue
20 aside, it is exactly the same problem. Part of the
21 justification yesterday for wanting to call the evidence
22 that has been submitted -

23 MR ABBOTT: I object to Mr Tilmouth having two bites
24 of the cherry and one yesterday. If he wants to make a
25 submission on s.35 -

26 COMSR: He is making a submission on the
27 tendering of this evidence.

28 MR ABBOTT: If that is an excuse to make a long
29 speech on s.35 and have another ago, I suggest we leave
30 off the tendering until Mr Tilmouth has said his bit.

31 COMSR: Yes, there is no reason why it should be
32 tendered now, I take it?

33 MR SMITH: No, exactly. That it is going to form
34 part of our argument, in any event. It is a very
35 interesting argument. If you take the argument of Ms
36 Layton et al, it means that it is impossible to argue
37 about, in any meaningful way. And I think that is just
38 absurd, in my submission.

1 COMSR: Are you putting to me it is an offence
2 for me to listen to any submissions from Mr Abbott
3 concerning this?

4 MR TILMOUTH: No, of course I am not putting that,
5 but, as to the content, I don't like to use the
6 pejorative word 'offence', but the fact of the matter
7 is, as has been demonstrated, the s.35 operation is a
8 blanket one. And, that being so, then there needs to be
9 demonstrated, as a matter of evidence or for some other
10 purpose to show that there has been a valid divulgence
11 before. Mr Smith will postpone it, so it is not a
12 problem, at the moment.

13 But the other matter is that, speaking for myself, I
14 would like to clarify what use is intended to be made of
15 it. There has been a long ranging debate about whether
16 you can try and prove, presumably, or use evidence of
17 fabrication from a secondary source such as a newspaper
18 record, a television interview and the like. And I am
19 just wondering for what purpose Mr Smith is tendering
20 the material, quite apart from s.35?

21 COMSR: I understood he is tendering the
22 material, because it is the material that he has
23 referred to and read from in support of his argument
24 that these matters are in the public arena.

25 MR TILMOUTH: I see, I can understand that, to an
26 extent, but, if that is all it is, that is understood,
27 but my point would be that it couldn't be used as
28 evidence of fabrication.

29 MR SMITH: Perhaps I put my learned friend on
30 notice that that is going to be one of its purposes, as
31 well.

32 MR TILMOUTH: We are on notice and again the question
33 is postponed, because he is not proposing to tender it
34 now. We don't accept that you can prove fabrication
35 through an indirect route such as that.

36 COMSR: Yes, that may go to weight, but
37 obviously you intend to argue that, but, in any event,
38 you are postponing tendering it?

1 MR SMITH: Yes, I am happy to postpone that.

2 Perhaps I might also just add for those people at
3 the bar table, that you have raised with me, and quite
4 appropriately, the fact that the media are affected by
5 Ms Layton's argument, should it be upheld, quite
6 markedly. I have made efforts to contact Andrew Short,
7 who has come from time to time and made submissions on
8 behalf of the media. I am having difficulty doing that,
9 but, as I understand it, the arguments can't be complete
10 until the media has been heard on this topic. Perhaps
11 counsel might bear that in mind. I imagine that the
12 media will be wanting time to consider what Ms Layton
13 has said and, therefore, I can envisage that the
14 arguments won't conclude this afternoon.

15 COMSR: Mr Abbott, are you ready to address me
16 on this?

17 MR ABBOTT: I think we have got Mr Tilmouth and Ms
18 Pyke first. They are the ones that wish to rise in
19 support of Ms Layton. It is appropriate to listen to
20 all the arguments on one side before I have to respond
21 to them. They did promise to be short.

22 MR TILMOUTH: Perhaps you can explain where I haven't
23 been in the past?

24 To be short, I adopt the argument of Ms Layton,
25 which is an important and forceful argument regarding
26 the whole construction of the Act and, in particular,
27 that the control of the sites, objects, traditions and
28 beliefs, and so on, is very firmly with the Aboriginal
29 people. More importantly, as just foreshadowed, I adopt
30 the argument on s.35 that it is a blanket prohibition.
31 And, in that context, the importance of s.37, which
32 enables divulgence by those who are entrusted with the
33 information, which does not otherwise mean that there
34 has been a public disclosure, which means that there
35 can't be any further infringement of s.35. That
36 argument that she put to you about s.37 is very
37 important.

38 S.37 provides that:

1 `Nothing in this Act prevents Aboriginal people from
2 doing anything in relation to Aboriginal sites, objects
3 or reamins in accordance with Aboriginal tradition.'

4 And, as I understood the argument, that, if there
5 had been a divulgence by Aboriginal people, in
6 accordance with that section, nevertheless a subsequent
7 divulgence by other than those people under that section
8 would still be caught within the terms of s.35.

9 The other point I make about s.35 is this:

10 There has been some discussion about the enforcement
11 mechanisms through an offence, but it is more important
12 than that. S.35 would clearly give an enforceable
13 private right to those persons concerned, ie the
14 traditional owners, to enforce or prevent the breach of
15 the section in the civil courts. And the case that Ms
16 Layton cited is an example of that, even though it
17 occurred, of course, at common law there rather than
18 under the section.

19 And one final submission, and this is specifically
20 in relation to the Saunders report, and I don't go into
21 detailed content, for what I trust are obvious reasons.
22 But I repeat the argument I put yesterday about the
23 problems the tenderer has in relation to this document
24 being a document for the purpose of the Federal Act,
25 which said nothing about whether or not its publication
26 was, nevertheless, a breach of s.35.

27 I have already made my arguments about that.

28 COMSR: I am not quite clear. Does this mean
29 that the sale of that report to members of the public is
30 potentially an offence?

31 MR TILMOUTH: I think Mr Meyer said yesterday you can
32 buy it from ATSIC, but there is no evidence to show that
33 that is necessarily with the consent of or with the
34 knowledge of the people who own the information.

35 COMSR: And, if he were to loan it to someone?

36 MR TILMOUTH: That could create problems, as well,
37 under the State Act, subject to any protection he would
38 have from the legitimate distribution of the report for

1 the proper purposes of the Federal Act itself. But the
2 starting point is that there were orders in the Federal
3 Court that the report was only to be distributed for the
4 legitimate forensic purposes of the proceedings in the
5 Federal Court. There is an intrinsic argument, as
6 well -

7 MR SMITH: Could we have some detail about that?
8 Is that right?

9 MR TILMOUTH: I gave you details of that order the
10 other week.

11 MR SMITH: But the Saunders report wasn't in it.
12 Is Mr Tilmouth contending that the Saunders report
13 is captured by the s.13 documents and the
14 confidentiality order?

15 MR TILMOUTH: I understood it was. But I didn't bring
16 the papers with me. Can I deal with another argument on
17 that? I don't have those papers and I can't tell you
18 again what the orders were, except I think I did take
19 them when I made submissions in the Way Building some
20 weeks ago and I understand Mr Smith is aware of those
21 orders.

22 MR SMITH: Yes.

23 MR TILMOUTH: Can I make this point: there is a
24 fundamental difficulty, quite independently of all those
25 arguments that I have presented and Ms Layton has
26 presented, more particularly in relation to the Saunders
27 report. And that is as to content. The content of that
28 report gathers together, uses and sometimes cites or
29 quotes what is unquestionably s.35 material in turn.
30 And I don't want to go into it, but could I evidence
31 p.10, p.23, p.24 - and these are only random, they are
32 not meant to be exclusive - p.28, p.31, p.35 -

33 COMSR: You are not asking me to read them, are
34 you?

35 MR TILMOUTH: There is a problem, because the content
36 might be a breach of s.35 itself. This is one of our
37 points. Essentially, a lot of the Saunders material is
38 in breach of s.35, without the proper delegation,

1 because it quotes extensively and uses, as part of its
2 source material, what is unquestionably s.35 material.

3 COMSR: Yes, but, as I understand your argument,
4 I can't look at those pages to see if, in fact, it does
5 breach s.35?

6 MR TILMOUTH: That demonstrates the point we have been
7 trying to make, in the last few days. That we have
8 difficulty in getting instructions. We have difficulty
9 in cross-examining. And there is a fundamental problem
10 with unscrambling the eggs in terms of both the evidence
11 that has been given and the expert reports. The fact of
12 the matter is the Saunders report is full of material
13 which is undoubtedly subject to s.35, now the delegation
14 has been held invalid.

15 They are my submissions.

16 MS PYKE: Firstly, I would just like to express
17 some concern about how events transpired yesterday
18 afternoon. This is a preliminary point.

19 You may recall that Ms Layton read out certain of
20 the passages in the transcript where we were, in
21 essence, told that there would not be any evidence led
22 that touched upon s.35 or it was going to be
23 noncontentious evidence. Partly in reliance upon those
24 statements and, indeed, the information from counsel
25 assisting that nothing would be - it was his view that
26 the interests of Dr Fergie wouldn't be affected by the
27 evidence he was about to lead. I must say, it was with
28 some alarm that I read the transcript last night to find
29 that, shortly after I left the court, there was an
30 argument embarked upon, pursuant to s.35, and purporting
31 to refer to elements of Dr Fergie's report and media
32 statements that were allegedly connected with her. And
33 I just want it noted on the transcript that I am not
34 particularly happy at that course of events.

35 COMSR: Yes, I must say, I wasn't aware that
36 that was going to happen, but I trust that, if that has.
37 Inconvenienced you at all, Ms Pyke, if you need more
38 time to consider what you want to put to me -

1 MS PYKE: No, look, I have had the time, but just
2 putting it bluntly, I left in good faith to find that,
3 no sooner had I left, that Dr Fergie was becoming
4 embroiled in a dispute and reference was made to her
5 report. I just perhaps want that noted on the
6 transcript.

7 COMSR: Yes, certainly.

8 MS PYKE: It seems to me that what is evolving
9 here is an argument about whether certain evidence does
10 or does not contravene s.35 of the Aboriginal Heritage
11 Act. This argument is taking place in a climate where
12 there has been no authority given by the appropriate
13 Minister for there to be discussion in relation to
14 Aboriginal tradition or any authorisation that empowers
15 us to put to you any fact that may be, even in support
16 of our own arguments, a fact that the utterance of which
17 contravenes s.35.

18 I adverted to this argument earlier in the week and
19 I repeat it.

20 That I can tell you very clearly what my
21 instructions from Dr Fergie are, to the extent to which
22 I am able to take them, but some of the evidence that
23 was led yesterday she believes was in contravention of
24 s.35. She believes that evidence of the nature that
25 counsel assisting indicated that he was proposing to
26 lead, that is, information which was at p.1427 of the
27 transcript in her view may well contravene s.35.

28 COMSR: Was that evidence which was given, or
29 what was proposed to be given?

30 MS PYKE: Which was proposed to be given, but I
31 haven't been able to take full instructions from Dr
32 Fergie as to why she thinks that certain evidence has
33 been in contravention of s.35, because, of course, I am
34 not authorised to discuss that with her, at the moment,
35 nor, indeed, disclose that to your Honour. That is the
36 difficulty. We are having a big argument about s.35.
37 It should not be overlooked that we have no
38 authorisation.

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- 1 COMSR: So, this matter couldn't go before the
- 2 Supreme Court, without an authorisation?
- 3 CONTINUED

1 MS PYKE: Partly the difficulty is, to discuss
2 Aboriginal tradition, one needs an authority. There is
3 an easy way, in my submission, and indeed the Minister
4 has purported to use that mechanism in these
5 proceedings.

6 COMSR: For any person to discuss Aboriginal
7 tradition?

8 MS PYKE: Contrary to Aboriginal tradition. But
9 to determine whether something is contrary to Aboriginal
10 tradition ipso facto requires a discussion of Aboriginal
11 tradition in a way that may be found by you, or any
12 other tribunal, to be contrary to Aboriginal tradition.

13 COMSR: So before anyone embarks upon a
14 conversation about Aboriginal tradition, they require -

15 MS PYKE: No, they should ensure that the
16 information that they are disseminating does not
17 contravene Aboriginal tradition. There has a mechanism
18 been provided, not the least of which is the Aboriginal
19 Heritage Act.

20 I say what has happened here is that the Minister
21 has purported to perhaps assess certain information and
22 give an authority for that information to be revealed in
23 this tribunal. The Full Court have, for a number of
24 reasons, determined that that authority was invalid, not
25 the least of which was the lack of particularity, the
26 lack of consultation process with the Aboriginal people,
27 and generally.

28 So the Minister cannot authorise us, I submit, to
29 discuss areas of Aboriginal tradition, because his
30 authority has been found to be invalid, and he must now
31 go through another process, including identifying the
32 type of information for which he would seek to issue the
33 authority, and consult the Aboriginal community.

34 I suggest that what we have here is almost a bizarre
35 situation that is being put to you, that it is
36 appropriate for you to determine what information
37 contravenes Section 35 of the Aboriginal Heritage Act.
38 You are being asked to make that determination in a

1 vacuum. There is no evidence before you of an
2 anthropologist, an archaeologist, or indeed, Aboriginal
3 peoples or the traditional owners of the information.
4 You are being asked to make an assessment based upon
5 submission from lawyers at the bar table.

6 It would be perverse, I suggest, if, before the
7 Minister can issue an authority for information that has
8 been determined to be contrary to Aboriginal tradition
9 to be talked about, but he has to go through a
10 substantial consultation process, that you can make a
11 finding that information is not within the purview of
12 Section 35 without any consultation with anyone or any
13 expert evidence.

14 The difficulty we have is that we cannot put that
15 information before you to enable you to make the
16 finding. So you are making a finding in a vacuum as to
17 the existence or otherwise of Section 35 information.

18 The Minister wants that information that is found to be
19 Section 35 information, to go through a huge
20 consultation process to authorise its release.

21 Virtually you are usurping the functions of the Minister
22 and usurping the role of the consultation process.

23 COMSR: Must this occur if anyone wants to
24 discuss Aboriginal tradition?

25 MS PYKE: Yes.

26 COMSR: So before anyone could publish anything
27 about Aboriginal tradition -

28 MS PYKE: Yes, they must. I do not want to give
29 evidence from the bar table, but anthropologists and the
30 like, frequently seek permission or authority from the
31 Minister pursuant to the provisions of the Aboriginal
32 Heritage Act. This guide to the South Australian
33 Aboriginal Heritage Act - was it tendered this morning
34 as part of Ms Layton's submission - specifically has a

1 section on researchers and the like, on p.20, research
2 and publication, setting out the obligations on scholars
3 in the field to seek appropriate authority.

4 As I say, the step that you are taking is even a
5 more serious one than the Minister authorising a
6 publication of already known information. You are
7 purporting to determine what information does or doesn't
8 contravene Section 35. The step you are taking is a
9 more serious one based on almost no information,
10 certainly no consultation, and certainly no expert
11 evidence.

12 I just say that, as a matter of logic, simply cannot
13 be the position. The handbook sets out at p.15:
14 `If a person is in doubt about revealing the information
15 about an Aboriginal site, object, remains or tradition
16 to another person, then that person should seek
17 authorisation from the traditional owners responsible or
18 from the minister'.

19 The appropriate process in this inquiry, I suggest
20 to you, is for counsel assisting to get together all of
21 the information that touches in any way upon Aboriginal
22 tradition, custom and belief, to submit that to the
23 Minister, and for the Minister, in the first instance,
24 to form an assessment as to whether it is the type of
25 information that may or may not offend Section 35.

26 If the Minister forms the view that it is that sort
27 of information, he can include that in the type of
28 information upon which he seeks to consult with the
29 Aboriginal communities, and to take advice generally.
30 There is a clear mechanism that can be adopted that
31 doesn't require an inquiry in a vacuum.

32 Dr Fergie, whom I represent, is compromised. She
33 has handed excerpts from her report to you. There have
34 been statements she is alleged to have made to the media
35 that have been used as a basis of a submission by Mr
36 Smith that certain information can be used and doesn't
37 contravene Section 35.

1 Dr Fergie has a very different view about that to Mr
2 Smith. Certainly she didn't authorise the release of
3 her report. It is her view that her report very
4 substantially contravenes Section 35. But I am
5 hamstrung in making my submission to you without an
6 analysis of the nature and extent of the traditional
7 Aboriginal beliefs, which we believe are impinged upon.
8 So I cannot make a submission.

9 We take our obligations very seriously. Dr Fergie
10 is an anthropologist who has worked extensively in
11 Aboriginal communities. She has sought authorisations
12 in the course of her work around Australia.

13 I say that it simply cannot be that you can make a
14 determination of this nature on submissions from the bar
15 table with no evidence and no consultation with
16 Aboriginal people. They are my submissions.

17 MR LIVESEY: I have been instructed to join in the
18 application for the reasons expressed. I do not have
19 anything further that I can usefully add.

20 MR MEYER: I have agreed that I will go before Mr
21 Abbott in relation to the matter. Firstly, in relation
22 to the issue of the Saunders report and its publication,
23 I will try and assist Mr Tilmouth in relation to the
24 situation which existed in the Federal Court.

25 At p.18 of the transcript of the appeal in the
26 Federal Court, Mr Ernst Wilhelm appeared for the
27 Minister, and Ms Layton appeared for Mr Milera and Ms
28 Norvill, who, in essence, were represented as persons
29 backed by the ALRM in those proceedings. Just to avoid
30 confusion in later references, in the original
31 proceedings before O'Loughlin J, Ms Layton appeared for
32 the Minister and Mr Collett appeared for Mr Milera and
33 Ms Norvill. At p.18 of the transcript in the Full Court
34 proceedings, his Honour Black CJ said:

35 `Before we resume, the court understands that people in
36 the court cannot hear easily. It is very important that
37 people should be able to hear the proceedings. They are
38 public proceedings and we want you to hear. What the

1 court is doing is asking the transcript people, who have
2 a microphone, if they could put a loud speaker in the
3 back of the court so that people can hear. In the
4 meantime, we ask that counsel keep their voices up as
5 much as reasonable in the circumstances'.

6 Then at p.22 the Chief Justice interrupted Mr
7 Wilhelm and said:

8 `Just excuse me for a moment. We can get a loud speaker
9 into the court ... In the meantime we will try to keep
10 our voices up'.

11 So the appeal continued. Then we had Mr Wilhelm
12 referring to some of the documents which were section 13
13 documents. I will not read all of it because it is
14 tedious - in terms of its detail, not in terms of its
15 argument in the relevant part. He said:

16 `I refer your Honours first to Appeal Book volume 8, tab
17 C, p.15 ... available to those who wish to peruse it.'

18 He is referring to the appeal books. He is
19 referring to the appeal books which were prepared and
20 lodged in the court by the Minister, and by Mr Milera
21 and Ms Norvill, i.e. through the offices of the Crown
22 and through the offices of ALRM. They had put all of
23 these documents into the court in appeal books. The
24 Chief Justice of the Federal Court says that they are
25 publicly available documents. Those documents that are
26 section 13 reports, and that's the Saunders report.

27 It goes on from there, at p.95, Ms Layton was
28 addressing the court and she was referring to an
29 argument about the word `considered'. At line 14 she
30 said:

31 `I will go to the wording. I do agree there was a
32 slightly different wording, and if I go to it, rather
33 than guess.'

34 Then she refers to a transcript reference at p.497 and
35 quotes:

36 `At p.497 he says "My decision was based on the publicly
37 available report of the independent and highly respected

1 Professor Saunders ... it was in no way based on any
2 information in those envelopes".'

3 So what you have got is Ms Layton appearing in the
4 Federal Court, and in that instance appearing on
5 instructions from the ALRM, and citing, in support of
6 her argument, a reference to the publicly available
7 report of Professor Saunders. And now comes into these
8 proceedings and denies that the report is publicly
9 available and says that you should suppress it. That is
10 like the old laws of reprobate and reprobate.

11 You cannot, in one court, rely on what is said to be
12 a publicly available document in a public court, one
13 which is like this court, assisted with loud speakers so
14 that everybody can hear, and then come along here and
15 say 'No, it is not public. In fact, I want you to
16 suppress it because it is in breach'.

17 If it was in breach of the State Aboriginal Heritage
18 Act, why wasn't an authorisation obtained from the
19 Minister so that it could be referred to? In those
20 proceedings great care was taken to obtain appropriate
21 authorisations for reference to reports.

22 Mr Collett, quite commendably, was very careful
23 about it. It took very many days for him to be able to
24 obtain the authorisations that were required, because
25 some of the people that had to be spoken to weren't
26 available. But authorisations were made in respect of
27 the Edmonds report, restricting them to counsel and
28 perhaps to parties - we would need to check that - but
29 definitely not to the public; to the Lucas report; to
30 one of the Draper reports, the other one was made
31 publicly available because it wasn't considered to
32 require an authorisation and was called the 'briefing
33 paper'. Authorisations were received for a number of
34 different reports.

35 No authorisation was sought for Fergie. No
36 authorisation was sought for Saunders. Those documents
37 were openly and publicly referred to in the course of
38 proceedings. It was originally supplied to the

1 Chapmans' solicitors back in the previous July on a
2 confidential basis, but it was part of the
3 representations which were tendered in the Federal Court.

4 Contrary to the position put forward by Mr Tilmouth,
5 I do not think that there is in fact anything which
6 directly requires those documents to be considered to be
7 confidential. Just in the same way as the Chief Justice
8 said in relation to 8 volumes of the appeal books, it is
9 publicly available, anybody can go along and read it.

10 Part of that is exemplified by the matter set out at
11 p.498 of the transcript in the Federal Court. I
12 appeared in the Federal Court for the Chapmans. When
13 the argument commenced to the point of dealing with
14 evidence, I attempted to avoid tendering the section 13
15 documents. They were the documents which had been
16 referred to by the Minister in the making of his
17 decision. That is section 13 of the Administrative
18 Decisions Judicial Review Act, which is the shorthand
19 for the request that was made for reasons.

20 In the reasons that were given the Minister, I
21 referred to these various documents and listed them all.
22 Volumes of them were prepared. I attempted to put
23 forward an argument in the court that I didn't have to
24 tender them, but I lost that argument. At p.498, line
25 23, I said:

26 'Sir, I will tender the section 13 documents in toto as
27 being the documents referred to in the section 13
28 statement ... will be the two bundles plus the box of
29 representations, plus the cylinder.'

30 No restriction whatsoever was applied to those
31 documents. As I said, there were a considerable number
32 of dealings with some of the reports. At p.616 there
33 were some references to the fact that there were some
34 confidential reports in the box of documents. The
35 Draper report, for example. Mr Abbott appeared for some
36 Hindmarsh Island residents -

37 MR ABBOTT: Not me.

- 1 MR MEYER: No, Mr Hugh Abbott. His Honour said:
- 2 `Getting back to Mr Abbott's application, we have
- 3 extracted the Draper report in the white envelope ...
- 4 I give you leave Mr Abbott.'
- 5 CONTINUED

1 There is nothing which makes any of that material in any
2 way confidential. In fact, the Saunders' report is
3 openly and publicly available.

4 If it's an offence, then we have some difficulties
5 because you can go to the Parliamentary library and get
6 a copy, you can go to the college of TAFE libraries and
7 have a look at it. It's even one of the library's
8 references under whatever is the universal system for
9 the categorising of the documents - it could be Dewey.

10 The net result is - and, in fact, I'm quite stunned by
11 the argument which is put forward by Miss Layton and Mr
12 Tilmouth because never in any of these proceedings
13 before has it in any way been suggested that to discuss
14 anything that might happen to be associated with an
15 Aboriginal belief could conceivably be a breach of s.35.

16 Mr Collett cross-examined Mr Palyga in the Federal
17 Court proceedings at some length. I can produce copies
18 of it for you. I make the point that the issue of s.35
19 authorisations wasn't ignored in those Federal Court
20 proceedings. Specifically, Mr Collett was very careful
21 in seeking s.35 authorisations for material that he
22 considered was relevant to s.35 authorisations. There
23 didn't seem to be any difficulty in conducting a
24 cross-examination which (and I'm referring to p.542)
25 asked the question:

26 `Q. There is no point in arguing about what was in the
27 document and I don't propose to do so. They speak for
28 themselves. As you have said, you wanted to tell
29 Professor Saunders what you knew at that stage.'
30 He is referring to Palyga wanting to tell Saunders.

31 It goes on:

32 `But it's quite clear on the case simply what you are
33 ... a birthing site near the old police station at
34 Goolwa'.

35 This was a question asked by counsel for the ALRM not
36 considered to be requiring a s.35 authorisation. Not
37 considered to be breaching anything.

38 Now, we come along to this court and when it's not

1 counsel representing the ALRM who is seeking to ask any
2 of these questions, its objected to on the grounds it's
3 a s.35 matter, it may be in breach of s.35. I'm puzzled
4 as to to why counsel for ALRM would ask such questions
5 in one venue as counsel for the ALRM and then object to
6 questions being asked in another venue. Those asked
7 questions were asked in the presence of Miss Layton;
8 albeit that Miss Layton at that time was counsel for the
9 Minister.

10 It went on to deal with a letter from Rocky
11 Marshall, which has already been referred to in these
12 proceedings. It went on to discuss birthing sites. At
13 line 13 it says:

14 `Q. You saw what was contained in the Marshall letters
15 ... near the old Goolwa police station.

16 At line 30 on p.543, Mr Collett asks:

17 `Q. Doesn't it refer to the Murray Mouth ... with the
18 island. A. Yes, it does.' It goes on to deal with
19 mother legends and questions asked by Mr Collett of Mr
20 Palyga in relation to mother
21 legends. At p.545 line 25, it says:

22 `Q. Let us just loot at what was said about it in that
23 submission in the first paragraph under ... internal
24 female organs. A. Yes.'

25 None of these questions were avoided because they were a
26 problem and none of the documents were suggested to be
27 in any way restricted or not public.

28 Now, they come along here and say that, in fact,
29 there are restrictions and they are not public. In my
30 submission, that is just ludicrous. It's ludicrous to
31 come along and argue that something should be suppressed
32 when it has been put forward by the very persons who are
33 now arguing that is shouldn't be discussed.

34 I am happy to produce copies of the pages that I've
35 read from. I can provide copies of the Full Court
36 transcripts, copies of the items that I've just read
37 from at p.538 of the transcript. If I haven't enough
38 copies I apologise, and I will get some more.

1 The other point I make is regarding the first
2 publication by a man called Meyer (no relative), which
3 was in 1846. Since then, there have been a huge number
4 of publications in relation to matters of Aboriginal
5 tradition. There have been significant publications
6 since this Act came into force in 1988.

7 Now, it's suggested that if anybody in any way
8 refers to an Aboriginal submission at all, well then
9 that is against the terms of the Act. In my submission,
10 your obligation is to make sense of the piece of
11 legislation, not to interpret it in a way as to make
12 nonsense of it rather than to make sense of it.

13 The brief examination of s.35 - I won't traverse
14 this ground very much as I'm sure Mr Abbott will. It
15 requires that a person must not, in contravention of
16 Aboriginal tradition, divulge information, and it goes
17 on to set out the provisions. The essential feature is
18 the divulgence that has been in contravention of
19 Aboriginal tradition. Nothing I've heard so far
20 suggests that that is part of the Act that is being
21 considered. The words 'in contravention of Aboriginal
22 tradition' has been omitted from the argument that is
23 said to prevent there being any discussion.

24 Miss Layton recorded an argument about the absence
25 of the word 'secret' from the provisions of s.35. I
26 would have thought that the words 'in contravention of
27 Aboriginal tradition' implied that there must be a
28 provision or requirement to keep that secret. That is
29 a circular argument. If it's going to be in
30 contravention of the tradition, that must mean that it's
31 intended to be kept secret. To use the word 'secret'
32 when you have used the words 'in contravention of
33 Aboriginal tradition', is, in my submission,
34 unnecessary.

35 Miss Layton referred to s.6 of the Act. I don't
36 know what the reference to that was about, but if it was
37 of any relevance at all, I note that s.6(2)(f) provides
38 that:

1 `Any delegation doesn't prevent the Minister from acting
2 personally.'

3 So, I don't think that takes the matter any further at
4 all.

5 The other matters that I was going to put was, in
6 essence, relating to what Mr Tilmouth has exemplified.
7 If I say something like `There are Aboriginal grave
8 sites on Hindmarsh Island', I've commit an offence. It
9 goes so far, on that argument, to say you may not walk
10 on that ground over there because there are Aboriginal
11 grave sites in the area - and I've still committed an
12 offence even though I might be seen to be trying to
13 prevent what might be an offence in relation to
14 Aboriginal matters. It means that when I walk up to a
15 recognised, declared Aboriginal site and say to the
16 person who is with me `Do not go over to that fence site
17 over there, it is an Aboriginal site', that I'm
18 breaching s.35 of the Aboriginal Heritage Act. That is
19 plain ludicrous. It means that no directions can be
20 given, no protection can be given. It means that the
21 newspapers can never mention anything about Aboriginal
22 business. It will fade away from the public face, never
23 again to be mentioned for fear of people being
24 prosecuted.

25 Whilst I don't agree with everything that the press
26 says, they must have the right to say something about
27 Aboriginal affairs at some stage or other. They cannot
28 be prevented by an interpretation of the legislation, in
29 essence, which gags them from saying anything at all in
30 relation to the matter.

31 Finally, s.35 is a penal provision and would have
32 needed to be interpreted strictly and not as broad as my
33 friend contends, but I leave that to Mr Abbott.

34 MR ABBOTT: I want to start with some submissions in
35 relation to the Aboriginal Heritage Act. I need to take
36 you through some of the provisions that Miss Layton
37 referred you to, because my submissions lead to a
38 different result because we contend for a different

1 instruction than that contended for by those on my
2 right.

3 I say that both Mr Tilmouth and Miss Pyke on more
4 than one occasion each stressed the need for evidence
5 rather than an assertion from the bar table when dealing
6 with matters under s.35. That is a matter on which I
7 whole-heartedly agree, and in respect which I have been
8 urging that you should adopt that course in days past
9 before they ever mentioned it. Of course, their
10 position is that it's evidence that a divulgence - or to
11 use Mr Tilmouth's words, he said that it was encumbent
12 upon these who wanted to deploy the information. He
13 said there needs to be demonstrated by evidence that
14 there has been a valid divulgence. That is putting the
15 cart before the horse. There needs to be valid evidence
16 that there has, in fact, or what exists is, in fact,
17 Aboriginal tradition, because - and I'll return to this.
18 The evidence you have received (and on this I invite you
19 to act on until we hear to the contrary from my clients)
20 is that all of these topics, or most of them, that are
21 seeking to be ventilated are not matters of Aboriginal
22 tradition. The evidence that you received so far is
23 entirely to the contrary.

24 As I said, I agree with what fell from Mr Tilmouth
25 and Miss Pyke about the need for evidence, but there
26 needs to be evidence on every facet. The starting point
27 is the essential elements of s.35, but I'll return to
28 that because I want to go through the Act in some
29 detail.

30 I agree with my learned friend Mr Meyer that s.35 is
31 a penal section, whilst I also agree with Miss Layton
32 that the Act is special interests legislation. S.35 is
33 penal and must be construed narrowly because it has the
34 potential to deprive citizens of this State of their
35 liberty for up to a period of six months.

36 May I add, before I return to s.35, that it is
37 obvious that the section applies to all persons, both
38 Aboriginal and non-Aboriginal.

1 Now, may I go to the Act itself and the beginning of
2 the Act. If I could take you to Part I, the
3 Preliminary. You will observe that nowhere is
4 `Aboriginal heritage' defined, although the Act speaks
5 of itself as being the Aboriginal Heritage Act. In the
6 long title, we read that it's an Act to apply for the
7 protection and preservation of the Aboriginal heritage
8 and to do certain other things.

9 One can glean what is Aboriginal heritage by looking
10 at the Interpretation section. In the Interpretation
11 section, a number of significant aspects of what
12 generally would be regarded by most people as being
13 Aboriginal heritage are referred to.

14 I draw your particular attention to the following in
15 s.3 - and I don't deal with them in the order which they
16 are dealt with in s.3. I will deal with them in the
17 order which the public perceives them.

18 The Act refers to what, in popular parlance, is
19 called `sacred sites'. In the Act, they are referred to
20 as Aboriginal sites or Aboriginal sites. The Act refers
21 to what is often referred in common parlance as `sacred
22 objects'. The Act calls them Aboriginal objects. The
23 Act deals with Aboriginal burials and they are referred
24 to as Aboriginal remains.

25 I point out that, in essence, if we go through the
26 Act in a minute, you will see that the Act takes special
27 interest in the protection of sites, remains, and
28 objects. It also deals with Aboriginal tradition which
29 is defined in s.3 as, I accept, a wide way, depending
30 upon the construction that you take. I mean, I accept
31 that it's, to a degree, wide, but it of course does have
32 some constraints. So, before one embarks upon a
33 consideration of what the sections mean, you have to
34 look at what the Act is on about. What this Act is on
35 about is Aboriginal heritage expressed primarily through
36 Aboriginal sites, Aboriginal remains and Aboriginal
37 objects.

38 I do not overlook the definition of `Aboriginal

1 record'. I particularly draw your attention to it
2 because that is a separate category; and, as Miss Layton
3 rightly observed and, indeed, she drew your attention to
4 this fact, the `Aboriginal record' as defined as meaning
5 a record of information that must, in accordance with
6 Aboriginal tradition, be kept secret or from a person or
7 group of persons.

8 As I take you through the Act, you will see that if
9 you look for the protection of Aboriginal records, there
10 are certain sections that protect Aboriginal records in
11 a limited way. They can be acquired, they can be
12 compulsorily acquired, but the only section which, in my
13 submission, deals with the prohibition on their
14 divulgence, the divulgence of Aboriginal records, is
15 s.35. That is significant because, in my submission,
16 s.35 itself is referable to, if not exclusively then
17 peculiarly of secret and sacred material such as forms
18 the definition of `Aboriginal record'. I ask that you
19 bear in mind the constellation of heritage aspects
20 encompassed by sites, objects and remains on the one
21 hand and Aboriginal tradition and Aboriginal records on
22 the other.

23 I now refer you to Part III which is the next
24 important part because Part II is entitled
25 `Administration'. Part III deals with what one would
26 expect to be the chief matter of the Act, the protection
27 and preservation of Aboriginal heritage. This
28 reinforces my earlier submission that when you look at
29 what the Act is setting out to achieve by way of
30 protection and preservation of Aboriginal heritage, it
31 is the various divisions of Part III.

32 CONTINUED

1 In the first division, Division 1 of Part III, we get
2 back to `sites, objects and remains'. There is no.
3 Reference, in Division 1, to `Aboriginal records' and
4 `Aboriginal traditions'. And it deals with `machinery
5 for protecting sites, objects and remains'. And, so,.
6 Division 1 deals with the discovery of them.
7 Division 2 deals with the protection of them.
8 Again, I stress `sites, objects and remains'.
9 Division 3, which is on s.29, deals with `Aboriginal
10 objects'. So, it is still under the genus of `sites,
11 objects and remains'.
12 Division 4, however, strikes a new note. Instead of
13 dealing with `sites, objects and remains', it deals with
14 `sites, objects and records'. And I stress that there
15 has been a deliberate change, in Division 4, ss.30
16 through to s.34. And that is where, for the first time,
17 we find legislation that deals, not with the protection
18 of `sites, objects and records', but `the acquisition
19 and custody of'.
20 And, so, s.31 deals with `the acquisition of objects
21 and records'. S.32, `the surrender of objects and
22 records'. S.34, `the custody of objects and records'.
23 Then comes s.35, in Division 5.
24 I go on, at this stage, because I want to come back
25 to Division 5, to draw your attention to Division 6
26 `Aboriginal heritage agreements'.
27 Then we have `Miscellaneous'.
28 And that is the end of the Act.
29 So, we haven't got anywhere where there is any
30 prohibition on the divulgence of the material in an
31 Aboriginal record. And, remember, as Ms Layton rightly
32 stressed, that:
33 `An Aboriginal record is a record of information that
34 must, in accordance with Aboriginal tradition, be kept
35 secret from a person or group of persons.'
36 And where, may I ask, then, do we find the
37 protection or the prohibition on the divulgence of
38 Aboriginal records? And the answer, surely, is, in our

1 submission, s.35. And that, in my submission, is really
2 what s.35 is all about. It is to cover, not
3 exclusively, but mainly, the divulgence of secret
4 material, such as is found in Aboriginal records, as
5 defined under this Act. There is a wealth of remedial
6 provisions dealing with the protection for objects, for
7 remains and of sites, in other sections to which I have
8 already referred you in this division. And I stress,
9 there is nowhere where there is protection for the
10 divulgence of the secret material in the records, other
11 than s.35.

12 So, when we come to look at Division 5, 'Protection
13 of Traditions', there are three sections only. And I
14 will take you to the other two sections, first.

15 The last section is s.37. It is significant that
16 s.37 refers to 'sites, objects or remains'. It does not
17 deal with records:

18 'Nothing in this Act prevents Aboriginal people from
19 doing anything ... or remains, in accordance with
20 Aboriginal tradition.'

21 No power to deal with Aboriginal records, in the
22 same way. So, the draftsman has omitted 'records' from
23 s.37. Indeed, the draftsman has omitted 'records' from
24 s.35, but the draftsman, in s.35, has created two
25 categories. S.35 provides a prohibition unless
26 authorised:

27 '... an embargo on the divulgence of information
28 relating to two categories.'

29 Again, our well known phrase 'Site, Object, or
30 Remains', is in the first category. And the second
31 category is 'Aboriginal Tradition'. And that is what
32 all this debate is about that has lasted yesterday and
33 today. What does the draftsman mean in relation to
34 Aboriginal tradition? And my simple submission is this:
35 that, within the meaning of 'Aboriginal tradition', the
36 draftsman has encompassed the constant theme of what is
37 picked up in 'Aboriginal records'. Information that
38 must be kept secret, in accordance with Aboriginal

1 tradition. And, if you look at the definition now of
2 `Aboriginal record', you will see that they are, as it
3 were, two sides of the one coin. Because `Aboriginal
4 Tradition', which is the second placitum (b) of s.35
5 sub-s.1, talks of `Aboriginal tradition', which is
6 defined as being:
7 `... traditions, observances, customs or belief.'
8 And `Aboriginal records' are:
9 `... records of information that must be kept secret.'
10 Because they must be kept secret:
11 `... in accordance with Aboriginal tradition'.
12 It is the same theme being repeated. And, so, under
13 Aboriginal tradition, the draftsman intended that the
14 omnibus phrase of `Aboriginal tradition' would primarily
15 include protection for Aboriginal records being a record
16 of the oral information that must, in accordance with.
17 The Aboriginal tradition, be kept secret.
18 And that makes good sense, because, when you talk
19 about Aboriginal tradition, in terms that this Act talks
20 about it, you are not talking about a written tradition.
21 As is accepted, I think by all of us here, there was no
22 written account of the `traditions, observances, customs
23 or beliefs of the people who inhabited Australia before
24 European colonisation.'
25 The dictionary definition of `tradition', in The
26 Shorter Oxford Dictionary and the McQuarie Dictionary,
27 the McQuarie Dictionary refers to `tradition' as:
28 `The handed down of statements, belief, legends,
29 customs, etc., from generation to generation, especially
30 by word of mouth or by practice.'
31 And there are a number of other alternatives, but
32 that is the flavour.
33 In the Oxford Dictionary:
34 `Tradition: delivery, especially oral, of information or
35 instruction, a statement, belief, custom, etc., handed
36 down by nonwritten, especially oral means, from
37 generation to generation.'
38 And so on and so forth.

1 I have copies of these and I will hand them up, in
2 due course.

3 So, when you come to protect Aboriginal tradition
4 then, because that is what Division 5 is all about, you
5 have to take into account `sites, objects or remains'.
6 You have to take into account Aboriginal tradition in
7 two senses. The oral Aboriginal tradition and the oral
8 Aboriginal tradition, which has now, since European
9 colonisation, as the Act refers to, being recorded. And
10 what I say and what I submit is this: that what is being
11 protected are the secret aspects of both the oral and
12 the written tradition. And that is why this Act speaks
13 of Aboriginal records being the written down information
14 that, in accordance with the oral tradition, has to be
15 kept secret. And that is why it talks about Aboriginal
16 tradition in the wide terms that it does. And I come
17 back to our prime submission and that is that s.35
18 refers to secret, sacred material, whether it is written
19 down or whether it is expressed orally. It does not
20 refer to nonsecret and nonsacred material. And that
21 means that material which has escaped into the public
22 domain is no longer caught by s.35, at all.

23 S.35, as I have said, tries to deal with two
24 matters. The protection of information relating to
25 sites, objects and remains and the protection of
26 Aboriginal tradition. And, if you accept my submission,
27 both oral and the written down versions of those oral
28 traditions. And, so, therefore, we argue that s.35, in
29 its expression of oral tradition, the records,
30 Aboriginal records, are but a sub-set of Aboriginal
31 tradition. And I ask, rhetorically, why would s.35 (1)
32 refer only to Aboriginal sites, objects or remains, and
33 s.35 (1)(b) refer only to Aboriginal tradition and there
34 be no mention of Aboriginal records?

35 The answer that some might give would be that, by
36 defining `records', in accordance with Aboriginal
37 tradition, the expression of `Aboriginal tradition', as
38 the second sub-set of s.35 (1) catches, as I suggest it

1 does, the secret, sacred material, whether written down
2 or oral. And I am not the only one who regards the
3 section as appropriate to be read in this way. That
4 clearly comes through from the Minister's second reading
5 speech, to which Ms Layton kindly referred us to.

6 The Honourable Greg Crafter said, at p.1236, in
7 relation to `Aboriginal tradition':

8 `A proportion of information relating to Aboriginal
9 heritage is sacred or secret and its dissemination would
10 be contrary to Aboriginal tradition. As a result it is
11 an offence, under the Bill, to divulge information about
12 any Aboriginal site, object, or remains, or about
13 Aboriginal tradition, contrary to Aboriginal tradition.'

14 My learned friend said, well, there is no mention,
15 when the Minister went on, to sacred or secret. But, by
16 definition, there has to be, because the divulgence is
17 only contrary to tradition if the material is secret or
18 sacred. It cannot be against tradition to divulge
19 material which can be divulged. It can only be against
20 tradition, if there is an embargo on the divulging of
21 the material. And, when you ask, why would there be an
22 embargo? It has got to be either secret or sacred, or a
23 combination of both. There could be no genuine embargo
24 on material that was not secret. Because, if everyone
25 knew about it, the embargo would be nonsensical and
26 ineffectual.

27 So, in my submission, I am in good company with the
28 Minister, in the second reading speech, in the
29 interpretation I urge. And there is another, in my
30 submission, just as compelling argument, when you
31 consider the use of the word `divulge'. And I regard
32 this as important, or even perhaps more important than
33 the first argument that I put. And this is my second
34 argument, in relation to s.35.

35 The word `divulge' has been deliberately chosen.
36 The section does not say `except as authorised, a person
37 must not retail, disperse, disseminate, advertise', it
38 says `divulge information'. What does the word

1 `divulge' mean?

2 The Oxford Dictionary, in dealing with `divulge',
3 says:

4 `Make publicly known, publish, make a public statement
5 about, declare or tell openly something private or
6 secret, disclose, reveal.'

7 And the McQuarie Dictionary, says:

8 `Divulge: to disclose or reveal something private,
9 secret or previously unknown.'

10 I hand up copies of the relevant extracts from the
11 two dictionaries for you. And I supply copies to my
12 friends. I have two further copies, for anyone that is
13 interested in reading them.

14 So, the word `divulge' is a rather special word and
15 it reinforces what I have said about the Aboriginal
16 tradition and the prescription against divulging
17 information in contravention of Aboriginal tradition
18 being referable to the making known publicly, for the
19 first time, something that was previously secret. And,
20 I would add, and/or sacred. And, when you look at s.35,
21 and look at what it says, what it is really saying is
22 this: that a person - and that can be Aboriginal or
23 nonAboriginal, it applies to us all - a person must not,
24 in contravention of Aboriginal tradition, divulge
25 information relating to Aboriginal tradition. And I
26 will come back to this, in a little while, but it would
27 seem to me axiomatic that, before you can even descend
28 to consider whether there is material that attracts the
29 operation of s.35, you need evidence. And you need to
30 have evidence placed before you to substantiate two
31 questions.

32 The first question is, is the information
33 information which relates to Aboriginal tradition? And,
34 without that information being given, without that
35 evidence being given, unless counsel assisting tells you
36 something or gives you an assurance, then you should
37 proceed in the absence of any information, of any
38 evidence forthcoming and not rely upon the bald

1 assertions from the bar table that so far you have had
2 to rely on, from those to my right.

3 The second question that needs to be addressed by
4 evidence is, will the divulgence in the sense of is this
5 the first time that this is going to hit the public
6 arena, be in contravention of Aboriginal tradition?

7 And, in our submission, the short answer is, has
8 been and will always remain that it can only be in
9 contravention of Aboriginal tradition, if it is material
10 that cannot and should not be divulged because it is
11 sacred and/or secret.

12 CONTINUED

1 If the material does not come within those two
2 categories, then it either has already been divulged -
3 that is, it is no longer secret - or it is not in breach
4 of Aboriginal tradition because it is neither sacred nor
5 secret.

6 So for there to be any submission made to you along
7 the lines made by Ms Pyke, that there is a potential
8 contravention of Section 35, you must at least insist
9 that those who make assertions from the bar table
10 produce, by way of evidence, a prima facie case. That
11 someone comes along, either the custodian or the alleged
12 custodian of the information, and says this information
13 is so secret and so sacred it cannot be divulged, and
14 that to divulge the information so that it comes into
15 the public arena for the first time, would not merely
16 offend, but would be in contravention of Aboriginal
17 tradition.

18 It is one thing that it might be said it offends
19 Aboriginal tradition, but the Act says 'In contravention
20 of Aboriginal tradition'. How do we know whether any of
21 the material that has so far faintly - or, indeed, not
22 faintly by some counsel - suggested to be in breach of
23 Section 35: (a) forms part of Aboriginal tradition; and
24 (b), if divulged, would be in contravention of
25 Aboriginal tradition?

26 Mr Tilmouth would have us put the cart before the
27 horse. He would say, and he does say, that the
28 commission needs to have evidence that there has been a
29 lawful divulgence before you can even talk about it.

30 In this commission you have had evidence from Dr
31 Clarke, you have had evidence from more than half a
32 dozen of my clients, all of whom have said - and I
33 exempt Dr Clarke from this - the various categories of
34 information that has been put to them are not part of
35 Aboriginal tradition as it is defined in the Act.
36 Alternatively, they have said it might be a tradition in
37 the sense of a belief, but it is in the public arena.
38 It has been divulged. There is no question of it now

1 being secret.

2 Dr Fergie was good enough to prepare a paper. I
3 assume she wrote it, it has got her name on it. It is
4 called 'Whose Sacred Sites, Privilege in the Hindmarsh
5 Island Bridge Debate by Deane Fergie'. It is published
6 in the Current Affairs Bulletin of September 1995. She
7 says of Geoffery Partington, who wrote an article:
8 'Partington is also incorrect in suggesting that in the
9 Hindmarsh Island case the Ngarrindjeri women "need
10 divulge their beliefs to no-one except themselves, nor
11 explain or justify their beliefs in a court of law or
12 some other area".'

13 She goes on to say 'Aboriginal women did in fact
14 divulge their secret beliefs and subject them to
15 assessment'. If people choose to divulge their secret
16 beliefs - and I am accepting, for the purpose of this
17 submission only, that what was divulged to Dr Fergie
18 were their secret beliefs, then the divulgence has
19 already occurred. The previous secret has been vouched
20 safe to others, indeed, to Professor Saunders and her
21 assistant Ann Mullins. As Dr Fergie acknowledges:
22 'Aboriginal women did in fact divulge their secret
23 beliefs and subject them to assessment. As Partington
24 himself acknowledges, the restricted knowledge was
25 divulged with the consent of the Ngarrindjeri women to
26 Professor Cheryl Saunders and her assistant Ann Mullins
27 as part of the assessment process undertaken by the
28 Reporter under the Act. They were also disclosed
29 independently to me in the context of an
30 anthropological assessment of their significance.'

31 COMSR: That is a fairly limited divulgence,
32 isn't it? It is not placing it in the public arena.

33 MR ABBOTT: That is the secret sacred material
34 alleged to be in the envelopes. I do not need to bring
35 in other examples other than to refer you at all times
36 back to the Act. The key issue is divulgence in
37 contravention of Aboriginal tradition. There has to be
38 established by evidence what is the Aboriginal

1 tradition, because Aboriginal tradition is not just what
2 someone says it is. It is not just 'We say we have got
3 this belief'.

4 'Aboriginal tradition', under the Act, has a rather
5 special meaning which people have just regarded as being
6 so wide as to include everything, but in fact it
7 doesn't. If you read the definition of 'Aboriginal
8 tradition', there are two groups of Aboriginal
9 traditions.

10 First, it means the traditions, observances, customs
11 or beliefs of the people who inhabited Australia before
12 European colonisation. So we are talking about pre-1836
13 in the first part of the definition. We are talking
14 about Section 35 applying to beliefs, traditions,
15 customs or observances that date back for more than 150
16 years. That is the first part of Aboriginal tradition
17 which might be caught by Section 35. Something with a
18 rather long genealogy, you might think.

19 The second part of Aboriginal tradition is that it
20 includes traditions, observances, customs and beliefs
21 that have evolved or developed from that tradition. Not
22 from anywhere. Not from day one being some time in
23 1994. You cannot now come along and say: We are a
24 group of Aboriginal people, we've decided that as at 1
25 April 1994 we have had an Aboriginal tradition.

26 I mean, they could say that, but it wouldn't be
27 caught by Section 35, or protected by section 35, unless
28 it could be demonstrated that such a recently developed
29 tradition or claimed tradition was one that was a
30 tradition, observance, custom or belief that had evolved
31 or developed from a pre-1836 tradition, observance,
32 custom or belief.

33 There is, in my submission, a proper approach that
34 you might take in trying to work your way through this
35 section, because I suggest that, with respect to those
36 who preceded me, some of the submissions have not been
37 helpful.

38 Put yourself in your previous position as a judge of

1 the District Court, and someone appeared before you
2 charged with a breach of Section 35. You would look, as
3 one usually does, at what are the elements. If they are
4 charged with, in contravention of Aboriginal tradition,
5 divulging information relating to Aboriginal tradition,
6 the first question you would ask yourself is 'What is
7 this Aboriginal tradition?'

8 You would go back to the defence section and you
9 would observe, as I have observed, that if it could be
10 shown and proved beyond reasonable doubt that there was
11 a tradition, observance, custom or belief anti-dating
12 1836, that would be the first hurdle.

13 If people wanted to rely upon something more modern,
14 and not having a genealogy from 1836 onwards, they would
15 have to show that what they were now putting forward as
16 being 'Aboriginal tradition' evolved or developed from
17 pre-European colonisation, traditions, observances,
18 customs or beliefs. That is the first step they would
19 have to demonstrate to you.

20 Then they would have to show that the person who was
21 charged with the offence acted in contravention of that
22 tradition. So you would need to know two things: What
23 was the tradition it was in contravention of; and what
24 was the tradition that was divulged? Because it could
25 be in contravention of one Aboriginal tradition, and it
26 could be information relating to another Aboriginal
27 tradition. They do not have to be the same. They may
28 be the same, but not necessarily. So you would have to
29 ask yourself those two questions.

30 Then you would have to tackle the question of what
31 the word 'divulge' means, when it is obviously a special
32 word that means something more than just 'said' or
33 'uttered' or 'retailed'.

34 If you went to the dictionaries, as we have done,
35 you would obtain some idea that really what this section
36 is all about is protecting genuinely held legitimate
37 beliefs, either that pre-date European colonisation
38 which have genuinely evolved or developed thereafter,

1 from being foisted into the public arena and thereby
2 damaging, and indeed perhaps destroying because of the
3 very publication, the tradition which, on any view, has
4 to at least have been pre-European, either in its
5 totality, or built on pre-European traditions,
6 observances, customs or beliefs.

7 If you were hearing a case for a prosecution brought
8 by the State against Section 35, you no doubt want a
9 fairly strong body of evidence from someone before you
10 are satisfied that you have heard them establish the
11 ingredient of Aboriginal tradition, either in the sense
12 that they have proven Aboriginal tradition and a
13 contravention thereof, or they have proved that the
14 information that was in fact divulged was information
15 which related to an Aboriginal tradition as defined.

16 Finally, you would deal with the vexed question of
17 divulgence, and then you would decide whether there were
18 any other aspects of the matter that merited attention.
19 But that, in my submission, really highlights the
20 problem of those who assert from the bar table that we
21 can't touch this matter, this topic because it is a
22 Section 35 topic.

23 We can touch it because you have heard evidence from
24 a number of people that most, if not all of these
25 topics, are not prima facie Section 35 matters. You
26 have heard lots of assertions from barristers that the
27 topics do contravene Section 35, but no evidence. That
28 is why I repeat what I said the other day, and invite
29 you, if persons want to continue to assert potential
30 breaches of Section 35, to give them an opportunity to
31 produce evidence in support of it.

32 I still have Mr Tilmouth's words ringing in my ears,
33 'There needs to be demonstrated by evidence that there
34 has been a valid Aboriginal divulgence'. I say there
35 needs to be established by evidence there has been a
36 valid Aboriginal tradition, then you get to the issue of
37 a valid divulgence.

38 So, on the onus of proof aspect, before any view can

1 be reached of an actual or even potential breach of
2 Section 35, you need evidence of the following.
3 Firstly, the Aboriginal tradition said to be the
4 tradition to which the information relates; secondly,
5 the Aboriginal tradition said to be the one in respect
6 of which a divulgence would be in contravention of;
7 thirdly, you need evidence that there has been a
8 divulgence or is likely to be a divulgence by you
9 proceeding to hear the information.

10 Essentially, that means that someone has got to come
11 along and give you some evidence that the information
12 that you are about to embark upon and hear in this
13 courtroom is of a sacred or secret nature not in the
14 public domain; has not been deployed by those who
15 instruct some of my learned friends, and who give
16 interviews to the media when it suits them, and come
17 along here on other occasions and, through their
18 counsel, wish to assert that nothing can be heard in
19 this commission when much can be heard outside. I
20 stress that a bald assertion is not and can never be
21 enough.

22 My learned friend, Ms Layton, in essence took the
23 position that anything claimed by her clients - and she
24 said she represented, in essence, all Aboriginal people,
25 and whatever one might say about her standing and
26 ability to do so, I do not comment on that at all
27 because I have made my point on that already - but the
28 claim by her that anything claimed by Aboriginal people
29 to be within Aboriginal tradition thereby becomes
30 information relating to Aboriginal tradition, cannot be
31 left up in the air as an assertion and untested.

32 She did not specify which Aboriginal people. She
33 did not say whether she acted for any of these
34 Aboriginal people. She obviously hasn't taken into
35 account that a body of Aboriginal people for whom I act,
36 who have come along and given evidence, on their oath,
37 that none of this material is information relating to
38 Aboriginal tradition.

1 I say this not in terrorem, but it would be a sorry
2 day, for my clients' evidence on this subject to be
3 pushed aside by assertions from the bar table, when they
4 have come along and said `We don't regard this as
5 Aboriginal tradition'. If their evidence is to count
6 for little against an assertion from the bar table that
7 it is Aboriginal tradition, then it doesn't say much for
8 the value of evidence.

9 My learned friend, Ms Layton, took what I would
10 suggest an exorbitant approach to the breadth of section
11 35. She said that, firstly, there were three conditions
12 that had to be met. It had to be claimed by Aboriginals
13 - that was enough. She added, for good measure, that
14 certainly is this case, but then when Aboriginals make
15 the claim and they substantiate it in the witness box is
16 another question.

17 Her second condition was divulgence by one
18 non-Aboriginal to another non-Aboriginal. In my
19 submission, the Act covers all of us, not just
20 Aboriginals and non-Aboriginals. It is as much an
21 offence for Mr Milera or anyone else to act in breach of
22 Section 35, as it is for me or any one of my brethren at
23 the bar table.

24 Her third condition was `Done for a purpose, not for
25 respect but to criticise;. She said in those
26 circumstances there was a real potential for a breach of
27 section 35. I admire her courage in putting forward
28 such a submission. But I suggest that when it is
29 carefully examined it will be seen to have little
30 support in the wording of the Act.

31 In my submission, there is no justification for
32 implying from Section 35 that information can only be
33 divulged if done for respect of tradition, because that
34 is not an element which, in my submission, finds any
35 place in Section 35.

36 CONTINUED

37

1 It seems to me that really what she was putting was the
2 very thing that the Racial Discrimination Act enjoins
3 all of us not to let happen; that is, one law for
4 Aboriginal people and another law for non-Aboriginal
5 people. The divulgence is somehow okay if it's done by
6 Aborigines to Aborigines - and, of course, I anticipate
7 that in certain circumstances that is so. If it's done
8 in accordance with Aboriginal tradition, then no offence
9 is created. But the mere fact that it happens to be
10 Aboriginal to Aboriginal, or by Aboriginal to the rest
11 of Australia or South Australia, or via the 7.30 Report,
12 begs the question of whether it is or is not within
13 s.35. To adopt her argument would allow Doreen
14 Kartinyeri to divulge material to the 7.30 Report and to
15 prevent anyone else from repeating that material to
16 Channel 10, which would seem to be a farcical result.

17 So, I conclude by saying that if you carefully
18 consider the provisions of s.35, the framework of the
19 Act in which you find them, then, in my submission, it
20 is obvious that the two placita of s.35(1) contrasting
21 Aboriginal sites, objects or remains on the one hand is
22 subject to the protection of traditions via s.35, and
23 Aboriginal traditions per se on the other, if you go
24 back to Aboriginal tradition as defined, and couple that
25 with Aboriginal record which picks up Aboriginal
26 tradition, that gives you the flavour of what it is that
27 is sought to be protected by s.35. It is the secret
28 sacred information and knowledge of the Aboriginal
29 people of South Australia, but it is their secret sacred
30 material which has remained secret and sacred and which
31 has not been divulged in any relevant sense. And I am
32 prepared, for the purposes of this argument - and
33 perhaps not logically - to accept that there may be a
34 divulgence to a limited extent; e.g., with one
35 anthropologist that may fit into a different category.
36 We are not talking of different material from one
37 Aboriginal to one researcher, we are talking about: The
38 topics, we are talking about Mr Milera's voice on a tape

1 that's heard by lots of people, we are talking about
2 newspaper reports and media reports and we are talking
3 about material in the public domain that has been
4 deployed by some Aboriginal members of the community
5 when it suits them and that they now, via their counsel,
6 seek to put a fetter on it, which, in my submission,
7 should not be placed.

8 MR SMITH: Madam Commissioner, I can indicate that
9 contact has been made with the media and they do wish to
10 make - well, I should say that the transcript of these
11 arguments will be gotten to their representative and he
12 may wish to address you in the morning. I would wish to
13 address you briefly, and I'd prefer to do that at the
14 conclusion of the media submissions. I would be asking
15 you to hear the media in the morning myself and any
16 replies.

17 I suppose I would ask you, I imagine you would treat
18 Mr Denver as, in effect, standing by. If you needed to
19 consider this matter in some detail, I wouldn't bring
20 him back from Hindmarsh Island tomorrow.

21 COMSR: Obviously, I don't know how long the
22 arguments are likely to be. Somehow, it's suggested
23 that if this hearing, instead of constantly taking
24 evidence, pauses to take argument, that somehow it's not
25 proceeding with its business. However, of course,
26 argument concerning matters before me are every bit as
27 much the business of the Commission as is the taking of
28 evidence. But I think in the circumstances, clearly
29 just given the breadth and the extent of the arguments
30 and not knowing if I'm going to have more argument
31 addressed to me tomorrow, perhaps it would be better to
32 defer Mr Denver then to Monday.

33 MR SMITH: That would give you the weekend for your
34 considerations and defer him to Monday.

35 COMSR: I think it's preferable in the
36 circumstances that we do that.

37 MR SMITH: Bearing in mind that the time for
38 furnishing your final report was to expire tomorrow.

- 1 COMSR: I think it's been indicated that that is
2 not the case. I don't think I can meet that deadline.
- 3 MR SMITH: You're advised today that the time
4 within which you are to furnish a final report has been
5 extended until 1 November.
- 6 COMSR: That's correct. And, indeed, given the
7 question of whether the fresh authority is to issue may
8 take some time to resolve, there is ample time before
9 that is likely to happen, so that there is no necessity
10 to bring Mr Denver down tomorrow. It's not as if there
11 is any time pressure in that respect, and I rather - I
12 don't know if I'm going to hear more argument. I
13 suspect I may on this point.
- 14 MR SMITH: Well, you should, out of deference to
15 the arguments, the weekend would be better spent
16 considering those.
- 17 COMSR: I will need some time to consider them
18 and the authorities that I've been referred to. I'll
19 adjourn to 10 o'clock tomorrow and indicate in the
20 circumstances I think it is better to defer Mr Denver
21 off until Monday.
- 22 ADJOURNED 4.07 P.M. TO FRIDAY, 1 SEPTEMBER 1995 AT 10 A.M.

1 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

2

3 COMSR STEVENS

4

5 FRIDAY, 1 SEPTEMBER 1995

6

7 RESUMING 10.03 A.M.

8

9 MR ABBOTT: Before Mr Short starts. I have one
10 further point which I didn't make yesterday which I seek
11 leave to make. It will take me two minutes. I wanted
12 to respond to something Mr Tilmouth said and I omitted
13 to do so in my submissions yesterday. I make this by
14 way of endeavouring to assist you in your task. If I
15 may be permitted to have two minutes?

16 COMSR: Yes.

17 MR ABBOTT: I want to make it clear I was addressing
18 my submissions yesterday to what I discern to be the
19 basis on which the Section 35 submissions were made,
20 that is, that you should not be able to investigate
21 material in the public domain. That is as I understood
22 it. I didn't address submissions yesterday, nor do I
23 intend to address submissions today, on whether or not
24 you should look at material say in secret envelopes, and
25 whether that comes within Section 35.

26 COMSR: No, the application, as I understand it,
27 by counsel assisting is that he should be permitted to
28 lead material which is already in the public domain, and
29 he instanced the publications in which that material had
30 already been disseminated.

31 MR ABBOTT: Exactly. I have taken the submissions
32 of Ms Layton and Ms Pyke, and others, to be submissions
33 at large on the issue of whether or not material - which
34 I contend is already divulged, within the meaning of
35 that word - is already in the public domain and only
36 that aspect.

37 COMSR: Yes, that is the aspect before me.

38 MR ABBOTT: I wanted to make that quite clear. The

1 point I want to make this morning is that Mr Tilmouth
2 yesterday spoke of authorised or unauthorised
3 divulgence. In my submission, that is a misnomer.
4 There is no qualification on the word `divulge' at all.

5 There is only divulgence in accordance with
6 Aboriginal tradition which does not attract the
7 operation of Section 35, or divulgence which is not in
8 accordance with Aboriginal tradition which does attract
9 the operation of Section 35.

10 It is our submission that if divulgence has
11 occurred, and what is secret has already come into the
12 public domain, the Act, that is Section 35, has no
13 further part to play whatsoever. That must be so
14 because, if the contrary or the converse were to be the
15 case, that is, that there was still some prohibition on
16 material in the public domain, still some prohibition on
17 the dissemination of that material placed on the public
18 by Section 35, how on earth would any member of the
19 public know when they commit or do not commit an
20 offence?

21 It seems to me to be axiomatic that our laws are
22 framed in a way that a person, on reading the section,
23 can invariably - and I set aside the Income Tax
24 Assessment Act for present purposes - ascertain whether
25 or not he or she is breaking the law. It is only if you
26 construe Section 35 as meaning that once divulgence has
27 occurred, that once what is secret has come out into the
28 open, into the public domain, that the Act has no
29 further part to play, that people can walk around South
30 Australia secure in the knowledge that if they retail
31 information that relates to Aboriginal tradition because
32 they happen to discover it in the public domain, they
33 will not fall foul of Section 35.

34 To give you but one example, if Pinkie Mack or
35 Albert Karloan divulged or gave information to Berndt in
36 contravention of Aboriginal tradition, then that may or
37 may not be divulging. It depends on all sorts of
38 circumstances. It depends whether it was intended for

1 the public. It depends on all sorts of things. The
2 situation of an Aboriginal informant and an
3 anthropologist may be a unique category. You do not
4 have to decide that for the present purposes.

5 But once the Berndts publish this material in their
6 book and it enters the public domain in a book in this
7 form, then it cannot be the case that if I read
8 something in here and I write about it, that I am then
9 divulging information.

10 No matter how many Aboriginal people may say that
11 the material in this book is secret and should not be
12 divulged, the fact of the matter, on my submission, is
13 that the material already has been divulged and you do
14 not re-divulge, further divulge or continue to divulge.
15 It is not an ongoing process. That is because the Act
16 relates to the secret material. Once something is
17 brought out into the open it is no longer, by
18 definition, secret.

19 The only other aspect I should point out to you is
20 that the definition 'Aboriginal tradition' in this
21 Aboriginal Heritage Act, the State Act, in my
22 submission, is considerably narrower than that in the
23 Federal Act. The Federal Act does not link Aboriginal
24 tradition to customs and beliefs before European
25 colonisation and only traditions that evolve therefrom.

26 It is far wider. Those are my submissions.

27 MR SHORT: I appear today for the 'Advertiser' and
28 the 'Australian'.

29 COMSR: In view of perhaps your complaints in
30 the past that you had not been given timely warning of
31 any matter that might involve the media, I thought it
32 appropriate in this instance, if you wish to make any
33 submission, that you be advised.

34 MR SHORT: I appreciate the courtesy, commissioner.
35 I have had the opportunity to read yesterday's
36 transcript. There is much to be said in favour of the
37 submissions put by Mr Abbott. That is certainly the
38 stance we advocate. We agree Section 35 creates an

1 offence as a penal provision, and it should be construed
2 strictly in consequence.

3 We also submit that regard should be had to
4 presumption of irregularity. Absent evidence suggesting
5 a breach - and I emphasize 'absent' - you are entitled
6 to proceed. Here we emphasize that evidence,
7 particularly from those represented by Mr Abbott,
8 strongly suggests that no breach would take place, there
9 would be no divulgence contrary to Aboriginal tradition.
10 Submissions from the bar table should not outweigh that
11 sworn evidence.

12 We contend that those suggesting a breach of Section
13 35 should call evidence to support that assertion.
14 Weight should be given to the fact that, despite
15 invitations from the commission, no Aboriginal person
16 has come forward to give evidence suggesting the
17 proposed evidence would breach Section 35, or would be
18 contrary to Aboriginal tradition.

19 We contend that Section 35 applies to a divulgence
20 in the sense contended for by Mr Abbott, namely, the
21 bringing into the public domain of some further
22 material. It cannot apply to material which is already
23 in that domain. There may be questions of degree in
24 some cases as to whether something has been divulged,
25 whether a communication of one person to another could
26 ever be sufficient.

27 If it was a publication intended to be handed on to
28 the world at large, that would be a divulgence, we would
29 suggest. If it was intended to be kept secret, it may
30 not be. But that is not, as we understand the evidence
31 to be led, a relevant issue. Rather the evidence
32 proposed to be led deals with material which clearly is
33 in the public domain and is already divulged.

34 COMSR: I understand that, as far as your
35 clients are concerned, it is suggested that if something
36 is said in this commission about matters which are
37 already in the public domain, that, nevertheless, the
38 press would not be at liberty to repeat the offence, as

1 it were, by a further publication of such material.

2 MR SHORT: That, in our submission, demonstrates
3 the lack of tenability of that proposition. It just
4 cannot be. Take, for example, the 'Advertiser' article
5 of 7 June, headed 'Great Lie of Hindmarsh Island'. As I
6 understand the submission being put by those opposing
7 the application, the contents of that article could not
8 be republished, could not be repeated, you or I could
9 not hand those on to a person over morning coffee. We
10 could not discuss it. That cannot be. Once material is
11 in the public domain, however it got there, it has been
12 divulged, and there can be no further offence.

13 Take the Berndt book, 'A World That Was'. The sale
14 would be a breach, the publication a breach, lending the
15 book to anyone would be a breach, discussing its
16 contents would be a breach. This is a book that has
17 been available for some time, that I understand a large
18 number of those at the bar table have purchased, and no
19 doubt shared with others in the course of this inquiry.
20 The argument being put would suggest continuing to do so
21 would be unlawful. That cannot be. It is not the case.

22 Once something is in the public domain, however it
23 got there, Section 35 has no application. Whether
24 something was initially divulged on the 7.30 Report, on
25 Channel 10, in a newspaper, matters not. If it has been
26 publicized, there is no continuing offence, or no
27 offence by repeating that material. To say otherwise,
28 suggests that even a discussion of whether you could
29 republish that material would itself be a breach. It
30 becomes a nonsense.

31 With respect, the submissions put to you about
32 difficulties in people speaking to clients about matters
33 because it might contravene Section 35, again, is just a
34 nonsense. If it is in the public domain, of course they
35 can talk about it. Section 35 has no application. It
36 really does come back to what interpretation you give to
37 the word 'divulge'.

38 Mr Abbott has quite properly referred you to the

1 dictionary. You couldn't find a better place to find
2 out what a word means. It makes it clear it is dealing
3 with making public a fact that is not known. Once it is
4 public it ceases to be divulged in the sense that
5 Section 35 operates.

6 It makes sense of the section. It gives it some
7 practical operation. That is, namely, to keep secret
8 something which is secret. Not to create an unworkable
9 situation where people throughout the community every
10 day break the law, don't even know they are doing it,
11 but cannot in any event lawfully get advice on whether
12 or not they are.

13 In our submission, the commission should proceed to
14 hear the evidence and should proceed to do so publicly.
15 That is, on the understanding that this is material
16 which has already been in the public domain. As I
17 understand it, counsel assisting the commission has
18 already, by reference to various publications and
19 material, foreshadowed that all of the material to be
20 led is in the public domain.

21 If it becomes apparent that evidence is to be led
22 which is not already public, that would be a different
23 category. We acknowledge that. But the evidence in
24 issue, there is no barrier to it being heard, there is
25 no barrier to it being reported.

26 Could I also say that the interpretation that we
27 urge is consistent with enabling the commission to carry
28 out properly its Terms of Reference, namely, to carry
29 out its inquiry expeditiously. Obviously, that has got
30 to be done lawfully. On our interpretation, it clearly
31 is being done lawfully. We urge you to proceed to hear
32 the evidence publicly without further delay. If the
33 commission pleases.

34 COMSR: Before I call on counsel assisting, who
35 I understand has the right to the last word, is there
36 anyone else who wishes to make a submission?

37 MR COLLETT: I would like to reply to the
38 submissions. I have got five short points. Firstly,

1 there appears to be some misconception by some people
2 before this commission that the fact that there are
3 allegations of fabrication concerning Aboriginal
4 tradition, means that the matters which are asserted as
5 being fabricated shouldn't receive the protection of
6 Section 35.

7 We simply want to make it clear that that would be
8 an erroneous assumption and argument, and that it must
9 be so because section 5, as Ms Layton submitted, gives a
10 blanket protection. Of course, the commission must have
11 regard to the consequences, if it was later affirmed by
12 the commission that there was no fabrication, that to
13 have not afforded to the alleged fabrication the same
14 protection would have breached the Act.

15 Secondly, in relation to the Saunders report, we do
16 not want to make specific submissions in relation to
17 that or any other evidence, but we wish to point this
18 out to the commission. The Saunders report was a report
19 that was prepared specifically pursuant to section 10 of
20 the Commonwealth Aboriginal and Torres Strait Islander
21 Protection Act. In fact, section 10 required for that
22 report to be provided. To the extent that information
23 was required to be provided pursuant to section 10 of
24 the Federal Act, to the extent that that contravened
25 Section 35 of the State Act, of course Section 35 of the
26 State Act would have been inoperative.

27 CONTINUED

1 COMSR: What inference do you want me to draw
2 from that?

3 MR COLLETT: Well, simply this, that for the purpose
4 of the Federal inquiry of Mr Tickner under the
5 Commonwealth Act and the ADJR proceedings which attached
6 to that, there was no need for a s.35 authorisation in
7 respect of the Saunders report. We argue in respect of
8 that report, that was a representation wholly and
9 solely. That is the only - we are pointing out the
10 status of it in respect of those proceedings in case
11 there is any confusion about that.

12 In fact, I was going on to say that in relation to
13 that, there were certain authorisations which have been
14 referred to under s.35 for the purpose of the court
15 proceedings and, as Mr Meyer referred to them yesterday
16 and expressed some confusion about their scope, I hand
17 you a copy of those authorisations, and I have copies
18 for my friends.

19 MR COLLETT HANDS UP COPIES OF AUTHORISATIONS

20 MR COLLETT: All I want to draw your attention to is
21 two things: First, they relate - and I'm referring to
22 the first document dated 16 September 1994 - the
23 authorisations relate to the Draper report, a Draper
24 report, which is described there; and, secondly, in
25 sub-paragraph (b) of a Lucas report and two Edmonds
26 report. The second authorisation, which is the one that
27 Mr Meyer wasn't sure about, is the second page which,
28 from memory, whilst it is indistinct, is dated under the
29 signature of the Minister as, I think, 6 December 1994.
30 You will see that that relates to another Draper report,
31 the title of which is described there. I want the
32 Commission to have those for the sake of completeness.

33 The other thing I point out is the restrictive
34 nature of both authorisations. In you look at the
35 second paragraph of the first authorisation, you will
36 see it's described by the Minister as: 'Limited release
37 for the purpose of the proceedings of the Federal Court
38 action'. You will see at the bottom of each of the

1 sub-paragraphs -

2 MR ABBOTT: That is all he is asked to do.

3 MR COLLETT: You will see at the bottom of the
4 paragraph, both of the paragraphs, the particular name,
5 the people, the judge and the legal parties.

6 MR ABBOTT: That is limited because he was asked
7 that. He wasn't asked to do anything -

8 COMSR: Just a minute Mr Abbott. Mr Collett, I
9 suppose what my intention was drawn to and the
10 submission put to me yesterday was that during the
11 course of the Federal Court proceedings themselves,
12 matters were discussed in open court and in public,
13 which it is now urged to me cannot be discussed in this
14 hearing because of the provisions of s.35.

15 MR COLLETT: I want to address you on that as well.
16 I was coming to that. I was laying the factual basis,
17 given that Mr Meyer mentioned some of it.

18 The other factual basis or aspect of the factual
19 basis, I think, is portion of an order of O'Loughlin J,
20 which is before you and which is at p.99 of the
21 transcript. I will read it to you. This relates to the
22 s.13 reasons and documents which comprised a large
23 number, but not all. It comprised really all the
24 documents, apart from the affidavits and exhibits,
25 before the Federal Court. The order that was made on
26 12 September 1949 at p.99 was:

27 `Leave granted to the first respondent to lodge in court
28 a book of documents, being the documents referred to in
29 the s.13 reasons of the first respondent.'

30 Then, it goes on at lines 9 and 10:

31 `The court receive and retain the aforesaid box of
32 documents as confidential material to be examined by the
33 judge and staff until further order.'

34 I mention that as the matter was raised by counsel
35 assisting and that was raised by Mr Tilmouth previously
36 and I will hand that up.

37 COMSR: What effect do you say that that has on
38 the question before me; namely, whether to allow any

1 material to be introduced into these proceedings which
2 has already been published is, nevertheless, an offence?

3 MR COLLETT: I say that that is another part of the
4 factual basis that you should have before you. There
5 have been certain allegations about what was said in the
6 Federal Court, and I'm saying that there was - I wish to

7 COMSR: Complete the picture.

8 MR COLLETT: Complete the picture. That is all I say
9 about that and that does complete the picture.

10 COMSR: I thought I might have been missing some
11 point that you were attempting to make.

12 MR COLLETT: No, that is all I want to make. If I
13 come on to that matter now. The matter raised by Mr
14 Meyer about the use of certain documents in the Federal
15 Court, both at first instance and before the Full Court,
16 was, as I understood his argument, in relation to a
17 submission that, therefore, these matters were no longer
18 in the public domain. I deal with that as a matter of
19 law first and then deal with the arguments that you have
20 raised.

21 Our submission is that that argument is clearly
22 wrong. For the additional reasons to those that Miss
23 Layton put to you, firstly, I take you to s.35, to the
24 wording of it. I want you to focus on the word
25 'information' in s.35(1). You will see that what is
26 prohibited is the divulgence of information. That word
27 is unqualified. It doesn't say 'secret information', it
28 doesn't say 'confidential information' or 'restricted
29 information', it's 'any information'. The yard stick is
30 whether or not it's in contravention of Aboriginal
31 tradition, not whether its information already in the
32 public domain.

33 The second additional submission we put is this. To
34 argue that s.35 only relates to information that is not
35 already in the public domain, clearly and simply begs
36 the question of whether it is lawfully there. Miss
37 Layton gave an example yesterday (and I was interested
38 that Mr Short touched on it this morning) of the case of

1 Foster v Mountford & Rigby. That was a case where, on
2 any view, Dr Mountford's book 'Nomads of the Australian
3 Desert' got in the public domain. We say that whilst
4 that was a case which was considered a breach of
5 confidential information, the same principle applies.
6 It was only discovered and brought to the attention of
7 the court when an Aboriginal person read it and
8 immediately brought it before the court. That book had
9 been in the public domain. It was only after legal
10 action that it was taken from it. For all we know,
11 there may be other items of information in that position
12 at the moment. For all we know, the Berndt book may be
13 in that position. Neither you nor anyone else can make
14 the assumption whether the Berndt book is lawfully in
15 the public domain.

16 COMSR: I suppose that one would have a bit of
17 an idea with how many copies of an anthropological work
18 had been sold in a particular time.

19 MR COLLETT: Mr Meyer's submission said nothing about
20 the appropriate interpretation of s.35. But as you
21 point out, he attempted to suggest that s.35 material
22 had already been publicly raised by the parties in the
23 Federal Court.

24 The first observation that must be made about that
25 in relation to this very sensitive question, as in
26 relation to any question of law, is that two wrongs
27 don't make a right. We don't concede that there was
28 any wrongdoing; that's the first observation we make.
29 The second is -

30 COMSR: Perhaps I've lost track. You say that
31 it might have been wrong to have raised it publicly in
32 the Federal Court, but it would not have made it right
33 to raise it publicly in this hearing.

34 MR COLLETT: That's right. We don't say that what
35 was wrong was wrong, for the reasons I want to go on and
36 put to you. Firstly, I have given you the factual
37 substratum as to the s.35 authorisation and as to the
38 s.13 restrictions. Mr Meyer went on to - and as you

1 recall, read out concern passages of my
2 cross-examination of Mr Palyga. I point out that if you
3 read those, you will find that, firstly, they refer to
4 documents - either s.13 documents or documents which had
5 been tendered by Mr Meyer's clients - and the
6 cross-examination was very careful to simply say only
7 enough to refer to documents that were before Mr Palyga.
8 That was a very careful cross-examination and I took
9 great care to avoid any reference to s.35 material, what
10 would or could be referred to that.

11 COMSR: What about the answers elicited? Do you
12 say that they avoided that?

13 MR COLLETT: In context. The purpose of the
14 cross-examination was to ascertain precisely what the
15 witness was saying about an assertion that they didn't
16 know anything at this time. I urge you to read that
17 cross-examination in context.

18 The next point that Mr Meyer sought to make
19 something of was that the Full Court hearing of the
20 Federal Court proceedings was a public hearing. You
21 will recall he read a section of the transcript where
22 Black CJ said precisely that. Of course, it was. It
23 was a public hearing. It was a public hearing of an
24 appeal on four defined issues of law. The issues of law
25 were very clear and very well-known: First, from the
26 appeal notices; and, in the submissions that the judges
27 had. Black CJ knew precisely what was coming when he
28 said that. In fact, the only reference that there was
29 throughout the whole proceedings, as I recall it, that
30 went anywhere to mentioning sensitive information was
31 the passage that Mr Meyer read out, which is one that
32 counsel avoided by a mile mentioning any confidential
33 information. The issue was in context. It was public
34 because it could be and there was no breach.

35 There are only two other points I wish to address
36 you on. First, is the question of whether s.35 relates
37 only to secret information, which my learned friend Mr
38 Abbott has gone to some length to impress upon you.

1 If I can take you to s.35. The first thing that
2 must be pointed out is that the word `secret' does not
3 appear. The Act does not prohibit the divulgence of
4 secret information, it's the divulgence of information.
5 The yard stick is not secrecy, the yard stick is s.35(1)
6 which is clearly worded in contravention of Aboriginal
7 tradition. Nothing to do with secrecy.

8 COMSR: I think what Mr Abbott is saying is that
9 how to you divulge something that is not secret.

10 MR COLLETT: If I can expand on the argument. I'll
11 come back to that. That point is readily met. The
12 reference to the contravention of Aboriginal tradition,
13 it's submitted, is deliberate and very important. In
14 our submission, those words clearly indicate that
15 Parliament was not confining s.35 to secret information.
16 Secret information might be a part of it, but it is not
17 the whole of it.

18 There may be a number of ways in which information
19 contravenes Aboriginal tradition, which has nothing to
20 do with secrecy per se. For example, the evidence
21 before this Commission that there are categories of
22 information and categories of entitlement within
23 Aboriginal tradition which relate to matters such as:
24 The sex of people, whether or not they are Aboriginal or
25 white, whether or not they are initiated. Now, those
26 may well not relate to categories of secret information.
27 Obviously, our submission is that the words `In
28 contravention of Aboriginal tradition' are wider than
29 `secret'.

30 Mr Abbott suggested that this argument could also be
31 rebutted by the contention of what, in fact, s.35 was
32 relating to was Aboriginal records. You will remember
33 that a definition in s.3 of `Aboriginal record', where
34 `Aboriginal record' is defined as a record of
35 information that must, in accordance with Aboriginal
36 tradition, be kept secret from a person or group of
37 persons. In our submission, that contention is clearly
38 wrong if you compare the wording of s.35 with the

1 definition of 'Aboriginal record' in s.3. You will see
2 that they adopt clearly different wording. The word
3 'record' as defined in s.3, imports some additional
4 requirements which, we say, are significant. Firstly,
5 the word is 'record' rather than 'information', which we
6 submit connotes some degree of permanence. Secondly,
7 that has got to be secret. The subsequent concept of
8 'Aboriginal record' in s.3 is talking about something
9 entirely different altogether.

10 Our submission is that if Parliament had wanted s.35
11 to apply to secret information only, they would have
12 said so. As Miss Layton pointed out to you yesterday,
13 Parliament was quite clearly capable of using the word
14 'secret'. It did in the 'Aboriginal record', it didn't
15 in s.35. If Parliament had wanted s.35 to apply to
16 Aboriginal records only, that is what it would have
17 said: It would have said it went to the trouble to
18 define 'Aboriginal records'. But those are not the
19 words used in s.35.

20 Mr Abbott, as his final argument submitted to you,
21 tried to read up one of the meanings of divulging so as
22 to imply the adjective of 'secret' in s.35. But the
23 section must be read as a whole where the word 'secret'
24 is used in one part of the Act and not another. That is
25 significant. To attempt to imply it by a word
26 'divulging' which has 'secret' as only one of its
27 meanings, does an injustice to the word and the section.
28 It does not get over the contention that if Parliament
29 had meant to restrict it to 'secret', it would have used
30 the word.

31 The final matter which I wish to address you on
32 briefly is this. Mr Abbott submitted that there had to
33 be some evidence of, as I understood his argument, a
34 breach of s.35 before you should entertain a
35 prohibition. In our submission, firstly, there is no
36 requirement that there be prima facie evidence of
37 whether or not Aboriginal tradition applies. If you
38 look at s.35, it's a blanket protection and it's a

1 caveat. It's a caveat in the absence of an appropriate
2 authorisation by the Minister.
3 COMSR: I suppose one of the matters that might
4 cause some difficulty is this: That if something's
5 published in newspapers, seen on television, the
6 ordinary person in the street might well take that as an
7 invitation that they can discuss the matter, talk about
8 it - and no doubt that is what has been happening. So
9 that there would be constant breaches, as I understand
10 the argument that you have addressed to me, of this
11 section by the public at large. Are you saying that
12 that may well be so, but that doesn't affect the
13 definition of the section or the interpretation of the
14 section?
15 CONTINUED

1 MR COLLETT: That is what we would say, but we would
2 go on to say and, in fact, I was about to say -

3 COMSR: I anticipated you.

4 MR COLLETT: You have raised another arm of what I
5 was about to say and I will expand that.

6 It is for these reasons that, you having no
7 authorisation at this point in time and not being able
8 to assume you will, it behoves you to be very careful.
9 And, of course, the same argument applies to the press.

10 We are in an unusual and unique situation. You are in
11 the situation where you had an authorisation which you
12 now don't have. Your rights are no different from any
13 other member of the public, at this stage. You are
14 obliged to comply with s.35, just as the rest of us are.

15 COMSR: I have got the problem that I have to
16 decide what it means before I take steps to do what I am
17 required to do under the Terms of Reference. That is,
18 to enquire into the matter of a fabrication.

19 MR COLLETT: That's right, but only to the extent
20 that we have submitted. In other words, our submissions
21 have been about the meaning of s.35 in the abstract,
22 because - and this is the point I was going to make -
23 that is all you can do. One of the fallacies of Mr
24 Abbott's argument, in terms of what evidence should be
25 put before you, is this: you have to decide what it
26 means. You cannot decide whether, at this point in
27 time, anything is in breach of s.35, because you don't
28 have an authorisation to deal with the information. The
29 only person, under the Act, who could do that, is the
30 Minister. You cannot and must not be making decisions
31 about whether something breaches s.35.

32 COMSR: Are you saying the only person who can
33 discuss any of these matters without an authorisation is
34 either the traditional owners of the information or the
35 Minister? That any other person in South Australia who
36 discusses any of the matters which have been published
37 in the newspapers or shown on the television, without an
38 authorisation from the Minister, is in breach of the

1 Act?

2 MR COLLETT: I will deal with your situation first.

3 We say that you have to be very careful that you
4 don't tread into waters that unwittingly breach the
5 Act. And, of course, the public has to do the same.
6 And the public is in the same position, in a sense, that
7 a lot of information that was authorised is not
8 authorised now. Everyone should stand back, at this
9 Particular point in time.

10 COMSR: What was authorised before, as far as
11 the public was concerned, that isn't authorised now?

12 MR COLLETT: We haven't been here, but I understand
13 that one of your authorisations entitled you to
14 authorise the divulgence of s.35 information to people
15 who were in the hearing room and possibly, therefore, to
16 the press.

17 COMSR: No, I don't think so.

18 Are you saying that includes the press?

19 MR COLLETT: It must, if you have - if there was
20 someone in the hearing room who was a member of the
21 public.

22 COMSR: There were certainly some Ngarrindjeri
23 ladies who, in fact, called evidence as to their status
24 as Ngarrindjeri women and Mrs Fisher requested that a
25 person remain in the hearing room, because she was, as I
26 understood it, upset, at the time. And that lady was
27 required to sign an undertaking as to confidentiality.
28 And, of course, she is bound by the provisions of the
29 section herself.

30 Is there another circumstance that you are referring
31 to?

32 MR COLLETT: What I am referring to is your
33 authorisation, your second authorisation and clause 6 of
34 that. I think it was 27 July, from memory.

35 COMSR: The actual authorisation, itself?

36 MR COLLETT: Yes, which authorised the divulgence by
37 a witness during the course of the hearing before the
38 Royal Commission to those persons permitted by the

1 Commissioner to be present at the hearing. You, albeit
2 indirectly, had a part to play in an authorisation of
3 members of the -

4 COMSR: That's right, that divulged it to all
5 those persons who were present at the hearing.

6 MR COLLETT: That's right. I am giving that as an
7 instance of where you had power to authorise by being
8 able to say who was at the hearing during the
9 divulgence. That power is now gone.

10 COMSR: I can't assume I will ever get another
11 authorisation, so I must act on the assumption, at this
12 stage, that I may not get an authorisation.

13 MR COLLETT: That's right.

14 And, just to finish that argument and then come back
15 to what you are saying about the press: you must so
16 assume. And what we say follows from that is that you,
17 therefore, cannot at this point be determining, in the
18 absence of any authorisation, what falls within s.35 and
19 what doesn't. At this point in time, only the Minister
20 or his delegate can do that. And, in those
21 circumstances, we submit that, as a matter of law and as
22 a matter of prudence, you must stand back from all s.35
23 determinations, at all, until the question of
24 authorisations is resolved.

25 You have also raised the question of what about
26 members of the public?

27 Our submission is, in circumstances where there were
28 - subject to those authorisations - there may be members
29 of the public who now have information which is
30 unauthorised.

31 COMSR: What you are saying is that, at those
32 times when matters were discussed which were not in
33 private hearing, but which you say could be matters that
34 are encompassed by s.35, that breaches of the Act were
35 committed, under those circumstances?

36 MR COLLETT: I don't have to go that far. I am
37 saying people who have now discussed it may well be
38 breaching the Act. What we would say is those members

1 of the public have to be as careful as you and as us and
2 that is to stand back and not disseminate information
3 until the question of authorisations is resolved. And
4 that is the reason why Ms Layton sought orders not to
5 disseminate information.

6 COMSR: If I had an authorisation is it
7 conceivable that its terms would be so broad that it
8 would permit me to say that members of the public can
9 now discuss the information that was elicited during the
10 course of the hearing, or that it can be publicised? I
11 mean, surely the authorisation that I would receive
12 would be so narrow, even the one that I have, that it
13 couldn't possibly extend to me permitting members of the
14 public to discuss the matters that are raised?

15 MR COLLETT: That may well be right. It obviously
16 depends on the authorisation. You were asking a
17 question about whether members of the public might be
18 caught by the Act and I am showing a situation where
19 they clearly could be. Much of it really is
20 speculation, depending on whether or not, of course,
21 Aboriginal tradition has been contravened, which is the
22 bottom line of all of these questions. And we say,
23 where there is any such uncertainty, you, everyone here
24 and the public, should exercise care. That is really
25 what we are saying. And, as you will remember, as Ms
26 Layton read to you yesterday from the hand book in
27 relation to the Act, which clearly was written, not in
28 contemplation of these very unusual circumstances, but
29 it made the same point. If in doubt, don't disseminate,
30 go and ask the Department.

31 COMSR: If you pick up an old newspaper and you
32 haven't previously read an article in it, that would be
33 a further divulgence to the person reading it of
34 information that could be in possible conflict with the
35 provisions of the second one?

36 MR COLLETT: I don't want to be drawn on the picking
37 up of the newspaper, but the content may be, yes.

38 And they are our submissions.

1 MR MEYER: This is the first time, as I recollect,
2 that I have seen the documents that Mr Collett has
3 produced this morning. And I merely ask you to note the
4 authorisations that are produced as being the
5 authorisations for the Federal Court are limited to
6 reports relating to Aboriginal sites. They are
7 authorisations which have been sought by Mr Wooley, the
8 solicitor in ALRM, for the purposes of the proceedings
9 and, therefore, presumably in terms requested by him.

10 And, finally, they don't include any authorisation
11 for the Fergie report. The Fergie report is in no
12 different a situation as, for example, the Lucas report.
13 The Lucas report was a report commissioned by the
14 Chapmans some years before, I think in 1990 you will see
15 in para.(b) in the letter, in relation to matters that
16 were occurring then. The Fergie report was a report that
17 was commissioned by ALRM, ie it is commissioned in
18 exactly the same way by a party. And one would have
19 thought that, if a s.35 authorisation was required, then
20 ALRM would be the first people to apply their minds to
21 that, but, in fact, it was recognised that a s.35
22 authorisation wasn't required for the Fergie report.

23 They are the only matters.

24 MR LOVELL: We just support the submissions made by
25 Mr Abbott and Mr Short today.

26 I just draw your attention to one section of the
27 Act, s.45 (3), just in relation to a point that has been
28 raised.

29 When you are talking about matters such as the
30 Berndt book, on my understanding, that was published in
31 1993. I am not aware, but perhaps Mr Collett can inform
32 us if I am incorrect, I am not aware of any prosecution
33 in relation to that particular book and perhaps Mr
34 Collett can tell us whether or not any power or any
35 request was made to the Minister, pursuant to s.45 (3)?

36 COMSR: I don't know whether you are in a
37 position to answer that, Mr Collett?

38 MR COLLETT: I can't say either way. I just don't

1 know.

2 MS PYKE: Reference has been made, by Mr Meyer, to
3 the Fergie report. Of course, I wasn't a part of the
4 Federal Court, but I understood that that was one of the
5 s.13 documents and covered by Federal legislation. It
6 wasn't necessary for any authorities to be sought of the
7 type referred to by Mr Meyer.

8 MR MEYER: So was Lucas.

9 MS PYKE: My instructions are that they are in
10 different categories completely. Dr Fergie's report was
11 prepared specifically for the purposes of the submission
12 to the Minister and was clearly covered by quite a
13 different situation from Mr Lucas's report. It is a
14 s.13 document.

15 COMSR: Mr Smith, it looks as though everyone
16 who has wished to address arguments to me has done so.

17 MR SMITH: I don't intend to be long and perhaps I
18 will just begin my submission to you by telling you what
19 matters I am going to address and then go back to them.

20 I wish to say something by way of quick introduction
21 first. Then I wish to turn to the scheme of the Act,
22 very quickly. Thirdly, I want to go to a heading which
23 I have called 'The expressed Intent of the Legislators,
24 as gleaned from the legislators themselves and legal
25 commentators.' I then want to move to the topic of
26 construing s.35. And a conclusion about that
27 construction. I then want to quickly move to applying
28 what I have said to this issue in this Inquiry. And
29 then I want to mention some miscellaneous matters that
30 have arisen out of argument.

31 I start by saying that the Commission must begin
32 resolving this issue by being mindful of the Terms of
33 Reference and the particular injunction in the Terms of
34 Reference in clause 3. That is, amongst other things,
35 to comply with s.35 of the Heritage Act. And the
36 submissions I intend to make to you are based on taking
37 no robust view of the matter, at all, but advising you
38 that your first consideration is to that clause 3 and so

1 that care is to be taken.

2 I move then to the question of the scheme of the
3 Act.

4 I will refrain from addressing you in detail on this
5 matter, because what has been said as to the scheme of
6 the Act by both Mr Ms Layton QC and Mr Abbott QC has
7 been said ably and properly and we take no issue with
8 that analysis, as far as it went.

9 So, I now move to the third point, which is the
10 expressed intent of the legislators and some legal
11 commentary on the Act as a means by which you might take
12 assistance in interpreting s.35.

13 I take you immediately to the second reading speech
14 of Mr Crafter on which you can rely in part to assist
15 you in the interpretation of s.35. And, at p.1236 of
16 Hansard, I think you have that, that was handed up I
17 think by my learned friend, Ms Layton.

18 COMSR: Yes, it was.

19 MR SMITH: I will read it to you, in any event. At
20 p.1236 of Hansard, which was the second reading speech
21 by The Honourable G.J. Crafter, under the heading
22 `Aboriginal Tradition', Mr Crafter said:
23 `A proportion of information relating to Aboriginal
24 heritage is sacred or secret and its dissemination would
25 be contrary to Aboriginal tradition. As a result, it is
26 an offence under the Bill to divulge information about
27 any Aboriginal site, object or remains, or about
28 Aboriginal tradition contrary to Aboriginal tradition.'

29 And Mr Crafter went on, but there is a clear
30 indication that it was the intent of the legislators to
31 have s.35 work to protect confidential and secret
32 information.

33 Ms Layton handed to you a document from the
34 Aboriginal Heritage Branch of the Department of
35 Environment and Planning headed `A guide to the South
36 Australian Aboriginal Heritage Act (1988)'. A
37 publication in June of 1989 which provided some
38 assistance in interpretation of this rather difficult

1622
KC 22C

1 piece of legislation.

2 I take you to p.15 of that guide.

3 This document probably has no more impact on your
4 deliberations than perhaps an assistance. It is the
5 opinion of someone else in the branch or a number of
6 people in the branch about what they perceive as the
7 impact of s.35.

8 CONTINUED

1 But I put it to you on no higher basis than it was put
2 to you by Ms Layton. At about point 8 of p.15, you will
3 see there an assertion that both Section 35 and section
4 10 of the Act are concerned with confidentiality of
5 information. If you go over the page to the top of
6 p.16, there is a reinforcement of that, and an assertion
7 by the department that Section 35, on the other hand,
8 deals with the protection of Aboriginal tradition to
9 prevent the dissemination or publication of information
10 which, according to Aboriginal tradition, should be
11 restricted knowledge.

12 Before leaving this topic of what the law says, or
13 how you should interpret the section by reason of what
14 the legislators themselves say and legal commentators, I
15 hand to you and to my learned friends at the bar table,
16 a section of chapter 4 of the Law Book Company
17 Publication, Laws of Australia, headed 'Protection of
18 Cultural Confidences'. I will not read at length from
19 that document.

20 It begins by drawing attention to the fact that the
21 existence of an equitable entitlement in Aboriginal
22 people to protection of cultural confidence has been
23 recognised. The authors then proceed to deal with a
24 number of cases. Then in paragraph 30, at point 5, it
25 reads:

26 'The secret or confidential status of traditional
27 knowledge and practices has been recognised under a
28 number of statutes.'

29 If you turn over to the second page, you will find
30 that Section 35 is one of the statutes mentioned under
31 footnote number 4. Back to para.30, the authors go on,
32 after mentioning the Commonwealth Act:

33 'The entitlement to confidence of Aboriginal people
34 ... divulgence of information in contravention of
35 Aboriginal tradition'.

36 Footnote 4 mentions specifically Section 35. Turning to
37 Section 35, but still under my heading as to what
38 assistance you obtain in gleaning intent, my submission

1 is that Mr Abbott must be correct in asserting that
2 Aboriginal records must be embraced by the proscription
3 in section 35(1)(b), on the basis that an Aboriginal
4 record, if disclosed illicitly, to persons not entitled
5 to be the subject of such disclosure must bring into
6 operation section 35(1)(b).

7 It must be the case that a secret Aboriginal record,
8 as defined under the Act, is part of Aboriginal
9 tradition as defined, or, rather, it is Aboriginal
10 tradition in the sense that it is to be kept secret from
11 a person or group of persons as is said in the section
12 itself. Therefore, it must follow that a divulgence of
13 such a record would be a divulgence in contravention of
14 Aboriginal tradition if done so without authority, and
15 would offend against Section 35.

16 As I understand it, that was the thrust of Mr
17 Abbott's argument, and my advice would be that that must
18 be so. It appears that record is used in the definition
19 of section 3 and in sections 31 and 32, to indicate a
20 material object as opposed to perhaps an oral historical
21 record of knowledge. But it would be embraced by
22 section 35(1)(b) in the same way as oral historical
23 records of restricted or secret knowledge would be
24 encompassed by the section if divulged other than with
25 an authority.

26 I leave then that topic of the assistance you can
27 glean from, if you like, outside sources for the
28 question of whether Section 35 is about secrecy, or
29 restricted knowledge. It is my submission that it is.

30 Can I move to the question of construction of the
31 section. I have begun by articulating the section in
32 rather simplistic terms. That is, that part of the
33 section which concerns us, and I am dealing with section
34 35(1)(b), could be articulated as: a person must not
35 divulge information relating to Aboriginal tradition in
36 contravention of Aboriginal tradition.

37 Just dealing with the components of that
38 re-articulated section, if you like, the words `the

1 person' in the section must apply to any person,
2 Aboriginal or non-Aboriginal. The draftsman, in other
3 parts of the Act, distinguishes between Aboriginal
4 persons on the one hand, and persons on the other.

5 Section 37 - if indeed Mr Tilmouth was contending
6 this, and I am not sure - has nothing to say which
7 impairs that. You will remember section 37 of the Act
8 asserted:

9 `Nothing in this Act prevents Aboriginal people from
10 doing anything in relation to Aboriginal sites, objects
11 or remains in accordance with Aboriginal tradition'.
12 I am not sure what was contended about that section. It
13 was mentioned by Mr Tilmouth. But the outstanding
14 reservation in that section is the phrase `in accordance
15 with Aboriginal tradition'. No-one here would dispute
16 the fact that Aboriginal people can act on section 37,
17 but providing it remains in accordance with Aboriginal
18 tradition. So that if an Aboriginal person made a
19 divulgence of the sort envisaged by Section 35, which
20 was outside Aboriginal tradition, it would equally be an
21 offence.

22 Any other view of the interpretation you place on
23 `the person' would be discriminatory in the extreme and
24 contrary to Article 1 of the Convention for the
25 Elimination of Racial Discrimination, which was handed
26 to you by Ms Layton. That was the second page of that
27 cluster of two documents. You will see Article 1,
28 clause 4, talks about Special Measures Legislation.
29 You will see at the third last line:

30 `Provided, however, that such measures do not, as a
31 consequence, lead to the maintenance of separate rights
32 for different racial groups'.

33 I move to the question of the interpretation of the
34 word `divulge', which, in my submission, is the key to
35 the issue we are debating here. I submit that word
36 clearly goes beyond words such as `telling', `saying',
37 `ascertaining', `stating', `asserting'. It has the
38 quality of uncovering a secret, making public that which

1 is private. Mr Abbott handed to you a dictionary
2 excerpt.

3 COMSR: Yes, the excerpt from the Shorter Oxford
4 Dictionary.

5 MR SMITH: I haven't got extra copies of this. Do
6 you have the Shorter Oxford English dictionary?

7 COMSR: Yes, and the MacQuarie Concise
8 Dictionary.

9 MR SMITH: I am reading from the 1973 edition of
10 that. I will hand it up at the end of it. I am sure it
11 doesn't say anything different to the material you have
12 got. It says:
13 `Divulge is to make publicly known, to publish, to
14 declare or tell openly (something private or secret), to
15 disclose, reveal, to make common, impart generally, to
16 become publicly known'.
17 The word itself, as I said, imports the uncovering
18 of secret or private material. It would be a tautology
19 to use `secret' in juxtaposition with the word
20 `divulge'. I make one further point about `divulge'.
21 Once divulged, in that sense - once the secret, if you
22 like - is uncovered, once it is made public, it is quite
23 inappropriate to talk again of divulgence.

24 In my submission, and to maintain some of the
25 arguments that are made from the bar table, it is said
26 there can be numerous divulgements. In this sense, I
27 draw a distinction between a conveyance of information
28 by Aboriginal people in an isolated situation to, for
29 instance, an anthropologist. I would join with Mr
30 Abbott in saying that you do not need to grapple with
31 whether or not that is a divulgement in the sense
32 contended for in the section, because that is not the
33 position here that you are to rule on.

34 But where the divulgement is, as we have it here, a
35 divulgement into the public arena via the print and
36 electronic media, the matter is beyond debate. Once
37 that occurs, and once it occurs repeatedly, as it has
38 done here, the section has no work to do in terms of

1 saying that the proffering of a document to you, for
2 instance, such as a newspaper article, is a divulgence.
3 In my submission, that would be absurd.

4 I move then to the next element of my re-articulated
5 Section 35, which is information relating to Aboriginal
6 tradition. I have dealt with `a person must not
7 divulge'. I have dealt with `divulge'. I am now moving
8 onto information relating to Aboriginal tradition.
9 Aboriginal tradition is defined in section 3 of the Act.
10 That has been canvassed by my learned friends at the bar
11 table.

12 Aboriginal tradition is capable of identification.
13 Take, for instance, for the purposes of a prosecution,
14 or more relevantly, take, for instance, for the purposes
15 of the Minister consulting in order to obtain an
16 authority. It is necessary, as the Full Court have
17 indicated, for there to be some identification of the
18 Aboriginal tradition as a prelude to the Minister
19 granting or considering to grant an authorisation, as a
20 prelude, I would suggest, for any prosecution authority
21 even contemplating a prosecution under this section.

22 My submission is that the Aboriginal tradition must
23 be capable of objective ascertainment. That is done on
24 a daily basis in the legal system. In this case it
25 would be established by evidence, more often than not
26 expert evidence.

27 It was done in the case of *Foster v Mountford and*
28 *Rigney* (1976) 14 ALR 71, in the Supreme Court of
29 Northern Territory. Ms Layton actually handed copies of
30 this case to everybody. The facts have been canvassed,
31 so I will not do that. Can I take you immediately to
32 p.72 of the judgment of Muirhead J. at about line 25.
33 Muirhead J there draws attention to the fact:
34 `I heard evidence from Phillip Toyne of the Aboriginal
35 Legal Service in the centre here and Mark deGraaf ...
36 ... I am satisfied from this evidence.
37 His Honour then went on to canvass the evidence point by
38 point, but can I take you to the bottom paragraph on

1 p.72:
2 `The evidence of Mr deGraaf satisfied me that some
3 of the information revealed ... I believe, recognised by
4 the distinguished author in his caveat'.
5 Over to p.73 at about line 20 his Honour also says:
6 `I am satisfied that the book exposes some of these
7 secrets for the first time ... is likely to reveal to
8 the reader, matters not revealed before'.
9 CONTINUED

1 My learned friend Mr Collett made the point that
2 this book was in the public arena, the book of Mountford
3 I should say. I venture to suggest in answer to that,
4 that if the Mountford action had been taken a year or so
5 after the publication of that book, I would suggest
6 Muirhead J may have had difficulties in granting the
7 injunction that he did grant, based, as it was, on
8 protecting breached, breaches of confidentiality,
9 protecting matters that had not been revealed before. I
10 refer you to Foster v Mountford to simply highlight the
11 point that the question of what is the Aboriginal
12 tradition in the normal way is capable of being
13 ascertained objectively and by evidence.

14 I suggest, as in the case of Foster v Mountford, the
15 evidence, first of all, would come from ethnographic,
16 archaeological and anthropological and Aboriginal
17 sources. It is a difficult exercise, bearing in mind
18 the definition of Aboriginal tradition and the room it
19 leaves for the evolution and regeneration of culture.
20 However, it is a matter which is capable of definition,
21 is capable of ascertainment; and, indeed, for any
22 prosecution to be launched is an essential prerequisite.

23 In my submission, whether or not there is an
24 Aboriginal tradition involved is not a matter for the
25 Minister, as has been suggested. It is a matter which
26 cannot be ascertained or established by assertions from
27 the bar table.

28 I now move to the 4th part of the relevant portion
29 of s.35(1)(b) which is in contravention of Aboriginal
30 tradition. So I have dealt with the divulgence of
31 Aboriginal tradition, in contravention of Aboriginal
32 tradition.

33 Mam, plainly to constitute an offence, the
34 divulgence must offend against Aboriginal tradition.
35 The uncovering of the secret or the restricted
36 knowledge, the making known or making public of that
37 must be offensive to Aboriginal tradition as defined.
38 Therefore, the Aboriginal tradition must be that the

1 information is secret or restricted in some way for the
2 contravention to take place.

3 So, to say that the word `secret' or `restricted' or
4 some other word that has been used, is addressed, in my
5 submission, by the word `divulgence'. It's addressed
6 also by the fact that the divulgence must be in
7 contravention of Aboriginal tradition. It could only be
8 in contravention by being a divulgence of information
9 which Aboriginal tradition requires not to be divulged,
10 not to be made known, not to be made public; the
11 information which is limited to women's information,
12 limited to people who are initiates, or some such thing.
13 So that is all I have to submit on the question of the
14 construction of the relevant portion of the section for
15 your considerations.

16 My conclusion about that, or, in my submission,
17 about that in inclusion is that section 35(1)(b) is
18 focused on divulgences of information, information which
19 is secret, restricted or confidential in some way.

20 That, as I said before, is indicated by the use of that
21 word and the use of that word in conjunction with
22 contravention. Those two elements mitigate
23 categorically, in my submission, against a definition
24 which assumes all Aboriginal culture is restricted
25 unless authorised. In my submission, that assertion has
26 no validity and it's an argument invented by the ALRM.

27 MR COLLETT: I didn't put that argument. The ALRM
28 hasn't put the argument, with the greatest respect to my
29 learned friend. One of the few things I agreed with my
30 learned friend on is what he said; in other words, that
31 the section applies to information which is
32 confidential, restricted or secret. The point we make
33 is it's not just secret.

34 MR SMITH: I move - if I have misinterpreted the
35 argument of the ALRM, then I would withdraw that. I now
36 move to the heading of how you move from that
37 construction to the ruling you have to make here. Mam,
38 in a sense, the case of Foster v Mountford is an

1 assistance in what you have to rule on because, in a
2 way, s.35 is a statutory reflection of the common law
3 position which was recognised in Mountford's case. In
4 Mountford's case, Muirhead J recognised the common law
5 or equitable principle that protected confidences, and
6 the injunction was granted in Mountford's case for that
7 reason. His Honour found that the material provided to
8 Mountford which had been, by and large, secret for some
9 35 years, was material provided in confidence, so the
10 interlocutory injunction was granted and the book
11 halted.

12 There are some interesting comments by Muirhead J
13 that would assist you here. For instance, at about line
14 24 on p.73, his Honour makes the point:
15 `It's likely to reveal to the reader matters not
16 revealed before.'

17 There are recurring themes in the judgment of the
18 revelation, in effect, for the first time of long-held
19 secrets. My submission would be that where you have a
20 situation where the confidence is missing or it has been
21 lost by publication into the public arena over a long
22 period of time, then no remedy exists.

23 It's my submission to you that it is permissible for
24 this Commission to take evidence relating to the
25 contended for Aboriginal tradition without an
26 authorisation pursuant to s.35, providing the subject of
27 the evidence is already truly divulged; that is, it's
28 truly known by the public or it's truly in the public
29 arena. Another way of saying the same thing.

30 My submission is that the contended for Aboriginal
31 tradition is that there is secret women's business
32 associated with Hindmarsh Island as defined in the Terms
33 of Reference. If you could be satisfied that the
34 evidence to be led without the Minister's authorisation
35 does not go beyond that which is already in the public
36 arena, in the sense of it being particularised in the
37 print media calculate circulating in Adelaide and in the
38 country as a whole, particularised in the electronic

1 media both in this State and nationally, the subject of
2 freely available academic texts and articles and also
3 included in reports which are publicly available, then
4 my submission is that you could receive that evidence in
5 this inquiry with or without a s.35 authorisation.

6 I add to that by saying here that it surely must be
7 the case in a criminal prosecution for an offence
8 against s.35 that a person charged with that offence
9 would have a complete defence if he could establish, he
10 or she could establish, that there had been widespread
11 divulgence; that is, the loss of the secrecy or the
12 restriction or the loss of the confidentiality. My
13 suggestion would be that if upon being charged with an
14 offence against s.35, the Tribunal would be in a
15 position of recognising, as a reasonable possibility,
16 that the divulgence with which the defendant is charged
17 was, in fact, the subject of widespread public knowledge
18 before the alleged divulgence, there would be no
19 possibility of that defendant being convicted.

20 Therefore, in my submission, the suggestion that
21 newspaper arguments cannot be either used in this
22 inquiry or the subject of utterance is against
23 commonsense, particularly where those who contend for
24 women's business are, in two notable instances, the
25 instigators of the articles.

26 I move to my heading of which I've called the
27 'Miscellaneous matters'. For the evidence to be
28 continued to be led in this inquiry, it could be done,
29 as has been done largely in the media, by way of topic,
30 the mention of topic. An example of that is Mountford's
31 case itself where Muirhead J in his judgment, and
32 undoubtedly the evidence before him, canvassed the
33 topics of secrecy, if you like the descriptions, the
34 labels, the ceremonies, matters relating to initiation,
35 all those things, without venturing into the detail.

36 In a sense in large measure, the detail in any event
37 here is thus far inaccessible to us, but I suggest - and
38 I'm not going to go into it chapter and verse, but in

1 the Federal Court action which has been alluded to
2 repeatedly in submissions to you, that is exactly how
3 counsel conducted examinations. Indeed, I would suggest
4 - and I'll provide you with the references of the
5 cross-examination - that the examples given by Mr Meyer
6 yesterday are examples which went beyond topics. But
7 I'll provide you with a series of references to the
8 Federal Court transcript which this Commission has and
9 Which exemplify the fact that the representatives of the
10 ALRM in that case have canvassed matters of secret
11 sacred women's business, with various witnesses on
12 occasions going into some considerable detail, often
13 dealing with the broad topics that, in my submission,
14 are dealt with by the media, most of the media articles
15 which I read from two days ago.

16 The references are: the cross-examination of Mr
17 Palyga at p.528; the cross-examination, large slabs of
18 it which commenced at p.573 of Allan Campbell. Miss
19 Layton was acting - I think I've made a mistake about
20 that. Miss Layton was acting for - Mr Collett and Miss
21 Layton were acting for the Federal Minister. Mr Collett
22 was for the ALRM, Miss Layton for the Federal Minister.
23 So those references are also in the final addresses at
24 pp.1,051, 1,054 and 1,056. An interesting example of
25 how cross-examination proceeded is set out at p.692,
26 which are submissions. These are submissions by Miss
27 Layton to O'Loughlin J and this is at p.692 of the
28 transcript at about line 23:

29 `If this Act requires that this sort of secret
30 information ... given in a public fashion.'

31 As I understand it, and I'm sure Mr Collett will
32 correct me if I am wrong, but submissions and
33 cross-examination as to those topics were not protected
34 in the sense of a 35 authority, as we at one time had in
35 this inquiry. It is the case, it is my submission that
36 this inquiry could go to that extent.

37 MR COLLETT: Whilst my friend is pausing I don't want
38 to interrupt, but I am responding to the invitation I

1 was given. I can't comment on what he said. I would
2 like to reserve my right in writing. My recollection of
3 the portion that my learned friend read of that, this
4 was an entirely different context and in the context of
5 whether or not the Minister needed to know the precise
6 detail. And the Minister is an entirely different
7 position as is set out under s.10. If I could not take
8 up the time now, but I want to have a look at the
9 transcript. I don't have it here and if I could reserve
10 the right.

11 COMSR: Would you be able to do that during the
12 course of the afternoon?

13 MR COLLETT: Certainly.

14 MR SMITH: I think my learned junior suggests that
15 Mr Collett may be right. The point I was making is that
16 there is really a point highlighted by Miss Layton at
17 the top of p.692 where she says:

18 `There are many ways which one can talk about the
19 significance of something without knowing the intimate
20 detail involved in it.'

21 And that was the point she was making.

22 CONTINUED

1 So, that, in that sense, I am urging that this
2 Inquiry continue with evidence. Bearing that in mind -
3 COMSR: It goes no further than, you say,
4 indicating the nature of, but not going into the detail
5 of?

6 MR SMITH: To some extent, that is the way in which
7 the evidence can be handled, but evidence, for instance,
8 which is in the public arena, it may be permissible to
9 take a more robust view of that material. But, where
10 other matters are being canvassed which don't, if you
11 like, have that fall-back position, the way in which it
12 was done in the Federal Court would be nonetheless a way
13 of avoiding the implications of s.35.

14 I mention just one last matter under the heading
15 'Miscellaneous Matters'.

16 There is, in this argument, it seems to me, some
17 confusion between matters which are secret and sacred
18 and matters which are distasteful or unpalatable for
19 public discussion.

20 I am not sure of the end parameters of the arguments
21 of Mr Collett and Ms Layton, but, if it is a suggestion
22 that there is a reticence amongst Aboriginal people to
23 have discussed publicly birth, abortion and matters of
24 intimate female anatomy out of sensitivity, that is not
25 the point. That is not the issue. It is quite another
26 thing to say that it is against the law to do that and
27 that, to do that, without an authority, warrants
28 imprisonment.

29 I mention that only because, in the debate that has
30 taken place, it seems to me there is some confusion in
31 that area.

32 They are my submissions.

33 I would, before you rise, press the tender which was
34 adjourned yesterday of the media publications.

35 COMSR: Yes, that is a matter I can consider.

36 MS PYKE: I'm not sure whether it has been
37 addressed. I think Mr Tilmouth raised the issue
38 yesterday of the basis upon which the document was being

1 tendered.

2 COMSR: I think they are being tendered on the
3 basis that they - or one basis is that they demonstrate
4 what is already in the public arena?

5 MR SMITH: Yes, and there may be another purpose
6 for which they are used that Mr Tilmouth wants to be
7 heard about, but I will let him know -

8 COMSR: If and when that arises.

9 MR SMITH: Yes, but they need to be tendered now
10 and I ask you to receive them.

11 COMSR: Receive them for the purpose of
12 determining what is already in the public arena, at this
13 stage, is that what you are putting to me?

14 MR SMITH: Yes.

15 COMSR: To some extent I suppose to determine
16 whether or not I may receive them in evidence involves a
17 consideration of the arguments that have been put by Ms
18 Layton and Mr Collett.

19 MR SMITH: I would suggest that, for this tribunal
20 to really be taking the position that copies of The
21 Advertiser and material like that can no longer be the
22 subject of discussion, can no longer be read in
23 libraries or used in a hearing such as this -

24 COMSR: That has been put to me, though, as I
25 understand it, Mr Smith. And that is why I am saying
26 that it is a matter for me. I am not rejecting the
27 application to receive them in evidence, I am simply
28 saying that one of the arguments put to me, which I have
29 to consider, is that, by receiving them, by reading
30 them, it is an offence, under s.35.

31 I understand that to be the submission that has been
32 put to me, Mr Collett.

33 MR COLLETT: Of course, if it is contrary to
34 Aboriginal tradition, in the first place. And, as you
35 don't know that, we ask you or urge you to exercise
36 great caution.

37 COMSR: That's right, so it seems to me I must
38 reserve the question of receiving those documents until

1 I have considered the arguments that have been addressed
2 to me. If it is part of the submission that, for me to
3 receive them involves a breach of s.35, then I must
4 consider that aspect of it before I determine whether or
5 not I can receive them. As I understand, Mr Smith, you
6 have already indicated the nature of those articles when
7 you sought to tender them. As I say, I am not rejecting
8 your application.

9 MR SMITH: No, and I would be the last person to
10 resist a ruling. On the basis that I have read
11 exhaustively from portions of that, perhaps could they
12 be just marked for identification?

13 COMSR: Yes, they can be marked for
14 identification, certainly.

15 MR MEYER: I don't know whether it helps: I see
16 those two things as running in conjunction with each
17 other. We have a hand-in-glove situation.

18 COMSR: Yes, I think that is the case.

19 MFI 67 Documents marked 67 for identification.

20 MR MEYER: Usually a judge doesn't look at
21 documents which are marked for identification, but, in
22 this instance, you have to look at the documents, to
23 rule on their admissibility.

24 COMSR: Clearly it is an issue of fundamental
25 importance to determine whether or not - you mention all
26 the repetition of publicly disseminated material
27 contravenes s.35 and, in view of the extensive arguments
28 which have been addressed to me on this topic, I propose
29 to reserve my consideration of that issue to make a
30 ruling in respect of it on Monday.

31 MR SMITH: There is one small other matter, before
32 we rise, that, as counsel assisting, gave me some
33 concern.

34 In the events of the day before yesterday, I was
35 subject to some criticism by Ms Pyke and I put on record
36 that I held the firm view, and still do, that Mr
37 Denver's evidence did not involve - or, rather, requires
38 s.35 authorisation. And I did I accept, in effect,

1 allow Ms Pyke to leave the hearing on the basis that Dr
2 Fergie wasn't involved in Mr Denver's evidence. There
3 was then, shall I put it, strong, firm arguments made by
4 Ms Layton on behalf of ALRM after lunch and I addressed
5 you, on that afternoon, as to why the Commission took
6 the view that Mr Denver's evidence didn't involve
7 breaches of s.35. And, in the course of doing that, I
8 did, for instance, read from the Saunders report which
9 involved reading, in effect, from the Fergie report,
10 because Professor Saunders had quoted so exhaustively
11 from Dr Fergie. And so that obviously caused Ms Pyke
12 some concern. I simply say that that does not mean that
13 in anyway I alter my view as conveyed to her about Mr
14 Denver's evidence. If she took the view that that was
15 somehow a breach of protocol on my behalf, I am sorry
16 she takes that view, and that wasn't the position.

17 COMSR: Perhaps there is one thing I might
18 mention and it has got nothing to do with what has
19 proceeded this morning, but there appears to be a
20 perception, publicly stated, that this Commission has
21 received a further extension of time. It has received
22 an extension, but I am not aware of any prior extension
23 of time. So, it has received an extension of time, but
24 not a further extension and that extension is to 1
25 November 1995 within which to furnish a report.

26 MR SMITH: There being nothing further, I suggest
27 that the matter adjourn until 10 o'clock on Monday, on
28 the basis that, following your ruling, Mr Denver will be
29 recalled.

30 COMSR: He may or may not be recalled, Mr Smith.
31 If you would like to make your arguments, Mr Denver
32 should be advised that he may or may not be required, Mr
33 Smith.

34 MR SMITH: Yes, indeed.

35 COMSR: We will adjourn until 10 o'clock on
36 Monday.

37 ADJOURNED 11.50 A.M. TO MONDAY, 4 SEPTEMBER 1995 AT 10 A.M.

1 COMSR STEVENS

2

3 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

4

5 MONDAY, 4 SEPTEMBER 1995

6

7 RESUMING 10.11 A.M.

8 COMSR: In respect of the s.35 application, I

9 rule as follows:

10 (1) That the Commission may hear evidence of matters
11 already widely published or generally available to the
12 public in the press, on radio or television, in books,
13 reports or displays or court transcripts of evidence and
14 exhibits.

15 (2) That copies of such material can be received in
16 evidence to demonstrate the extent to which a matter has
17 already been publicised or is generally available to the
18 public. I have prepared written reasons for my rulings
19 and they will be available in just a few minutes.

20 MR SMITH: I suggest that we resume then with the
21 evidence of Mr Denver and there is another witness, a Mr
22 McLaren, at 11.30.

23 COMSR: I can make the written reasons available
24 to counsel then meanwhile and they can consider those
25 reasons then. We will adjourn.

26 ADJOURNED 10.15 A.M.

1 RESUMING 11.38 A.M.

2 MS LAYTON: Madam Commissioner, pursuant to the
3 leave that you gave the ALRM to raise the question of
4 the interpretation of s.35, there is a further related
5 matter that the ALRM wish to put; that is, that as a
6 consequence of the ruling, the ALRM has been given
7 instructions to contest that interpretation.

8 MR ABBOTT: I object to announcements of this sort.

9 MS LAYTON: It is to be in conjunction with
10 something else, Mr Abbott, if the Commissioner can hear
11 what it is that we seek to do.

12 COMSR: I will seek to hear what it is.

13 MR ABBOTT: I object on locus standi.

14 MR MEYER: I appreciate that. I have shown a great
15 deal of latitude as far as Miss Layton is concerned,
16 considering that I haven't proposed the question of
17 locus standi in the circumstance. You do appreciate
18 that either you represent a party or you don't. It's
19 difficult to see the standing that you have. I will
20 hear what it is that you say. Can you address me as to
21 what are the circumstances?

22 MS LAYTON: What I wish to do flows on from the
23 ruling. It is directly related to that. In any event,
24 we have instructions to contest it by taking out a
25 Supreme Court proceeding, either by way of re-opening
26 the existing application, or, alternatively, applying
27 for a construction summons to interpret s.35, or,
28 alternatively, a declaration together with a related
29 injunction. It's as a consequence of those instructions
30 that we will take out the application as a matter of
31 urgency either later today or tomorrow morning.

32 In the meantime, we seek that this matter be
33 adjourned for a period of 48 hours to enable us to take
34 out such an application. The grounds upon which we
35 request that the matter be adjourned is that we
36 understand that the evidence of Mr Denver, in
37 particular, is to continue. Bearing in mind the
38 interpretation that the ALRM put to the Commission as to

1 how s.35 ought to be interpreted, that would infringe at
2 least the interpretation that we submitted to you was
3 the appropriate one. Also, we understand that other
4 witnesses are sought to be called who may well also
5 infringe on that interpretation. It's on that basis
6 that we seek that the matter be adjourned for 48 hours.
7 It is a very short time indeed.

8 We point out that this is an extremely important
9 section and important to Aboriginal people. That if you
10 are correct in the interpretation, then it means that as
11 soon as information about Aboriginal tradition is
12 divulged -

13 COMSR: I think that is a matter that you should
14 address the Supreme Court on and not me.

15 MS LAYTON: Certainly, but it is as soon as that is
16 divulged, that is a problem. If the interpretation that
17 you have given is the correct even, if it's an
18 inadvertent interpretation or divulgence, or an
19 advertent one or a malicious one, it would not be able
20 to have the protection of s.35. So that is the
21 application that we strongly urge upon you, to give the
22 ALRM a period of 48 hours in which we could take out an
23 appropriate Supreme Court action with regard to s.35.
24 That is the completion of the submission I make on it.

25 COMSR: In any event, you're advising me that
26 that is the action that you are proposing to take?

27 MS LAYTON: Yes, that is.

28 MR ABBOTT: Before Mr Smith gives his view, I rise
29 to oppose that application for a number of reasons.
30 Firstly, as my learned friend made it perfectly clear,
31 that only one of the three courses of action which she
32 proposed to examine carries with it the 'related
33 injunction'. The other proceedings, by their own
34 nature, are not injunctive and it's only if she issues
35 an injunction - a declaration that she has any hope of
36 injunction. It would be our submission that these
37 proceedings in this Commission cannot be injuncted
38 unless you act completely ultra vires or illegally.

1 I draw your attention to s.9 of the Royal
2 Commissions Act which says:
3 `That no decision, determination, certificate or other
4 act or proceeding of the Commission or anything done or
5 the omission of anything or anything proposed to be done
6 or omitted to be done by the Commission shall in any
7 manner whatsoever be questioned or reviewed or be
8 retained or removed my prohibition, injunction
9 certiorari or howsoever.'

10 The spirit of the Royal Commissions Act is not that a
11 Royal Commission will stop or that they will be closed
12 down, and that is not to deny that parties who
13 demonstrate - and I emphasise `demonstrate' - an
14 appropriate locus standi before the Supreme Court can
15 seek resolution of the interpretation of Acts of the
16 Parliament and, in particular, for example, s.35.

17 We are hear engaged upon a task in respect of which
18 several days have been already taken up in the
19 resolution of this very issue and, now that it's been
20 resolved, it is our submission that you should proceed
21 forthwith to hear the evidence. It may be that the
22 instructions from the ALRM, if they thought them out a
23 bit further, might go away. They might decide they had
24 no hope in any way of seeking a different ruling from
25 the ruling that you have given. So, my learned friend
26 comes here - and I accept that she has the instructions
27 at present. We submit, and I submit particularly that
28 you should not say that as she has got those
29 instructions, therefore, there is a risk that somehow
30 the Supreme Court might do something different. If we
31 all acted in that way, then we would never cross the
32 road. In my submission, it's appropriate that you
33 should proceed immediately. After all, we have already
34 taken an hour and a half while counsel could consider
35 the matters arising from your judgment, from your
36 ruling.

37 COMSR: It may, of course, if one followed what
38 you're suggesting, may nevertheless be a question of the

1 manner in which the evidence is received; that is,
2 whether it's in open hearing or restricted hearing under
3 the circumstances.

4 MR ABBOTT: That doesn't worry me. That is a matter
5 of fine-tuning. I think we should go on with it.

6 COMSR: I don't know if anyone else wishes to
7 address me?

8 MR TILMOUTH: I would quickly say that I support the
9 application for the adjournment period, which is
10 relatively short. It is a very important question of
11 principle. The difficulty, of course, is that if the
12 material is now received, that it may cause
13 irreversible, it may be irreversible. No doubt later,
14 too, depending on the ruling of the Supreme Court, we
15 might be faced with the further argument as received in
16 the last few days that it's in the public domain anyway.
17 What I say to you is that by proceeding now, further
18 damage might be done if further information is divulged
19 in the next few days in this Commission.

20 COMSR: I don't think we are talking about
21 further information, we are talking about, I think,
22 information that is already generally known and widely
23 available to the public.

24 MR TILMOUTH: I understand the basis of your ruling.
25 I understand that is part of the basis for which or upon
26 which the challenge would be mounted. My point is that
27 if that argument is right - and it's plainly arguable,
28 it is not a silly point that Miss Layton puts up -
29 further damage can be done by proceeding down that path.
30 I point out that s.9 of the Royal Commissions Act
31 does not prevent a declaration or other type action in
32 an appropriate manner. The recent proceedings
33 demonstrate that.

34 COMSR: Does anyone else wish to submit
35 anything?

36 MR SMITH: No. Other than my submission to you is
37 that I draw your - I remind you that out of deference to
38 the ALRM and out of deference in particular to the

1 invitation that the ALRM had from the Supreme Court to
2 speak to you about the judgment, we have delayed the
3 evidence for some several days and you have made a
4 ruling. The Commission has resolved the issue so far as
5 the issue is concerned and we should proceed with the
6 evidence.

7 MS LAYTON: If I could reply shortly. The first
8 matter I raise or indicate is that s.9 of the Royal
9 Commissions Act doesn't mean that one cannot take an
10 injunction. That s.6 of the Crown Law Proceedings Act
11 makes it obvious that in Crown law, that would also
12 include you acting on a Royal prerogative which can be
13 the subject of an injunction, but it wouldn't be a
14 mandatory injunction, it is only an injunction by way of
15 prohibition. That is no barrier to an injunction sought
16 either in one of the existing actions, which happens to
17 be s.35, or by way of a separate action.

18 The second thing is that in so far as the Royal
19 Commission may consider that divulgence of information
20 in camera might be still available, it is not our
21 submission - that is still a divulgence and we would
22 suggest -

23 COMSR: No doubt that is a divulgence, but the
24 question is whether, given the public nature of what is
25 sought to be divulged, whether, in fact, that and the
26 persons who would be concerned already knowing the
27 information, that it would be something that is already
28 within the knowledge of those persons, whether anything
29 could be said to be divulged to them in those
30 circumstances.

31 MS LAYTON: This, of course, is the very issue we
32 wish to challenge, with respect; that is, what your
33 ruling is about. That is the very issue, we submit, is
34 a misinterpretation. So, we say that given our
35 interpretation and any evidence which is sought to be
36 adduced at this particular time within the next 48
37 hours, that it would offend s.35 if we are correct.
38 That is the submission that we wish to have the

1 opportunity of putting to the Supreme Court and it is
2 not as though we are seeking a week, two weeks. 48
3 hours is a very short period of time and one wonders
4 what the rush is at this particular time? I mean, why
5 must it go on and be continued to be driven when 48
6 hours is sought in order to take up an extremely
7 important point of statutory interpretation? We submit
8 that when it comes to a matter of time versus justice,
9 that justice must prevail in circumstance like that
10 where the identification is that information will be
11 divulged pursuant to s.35, contrary to s.35, and it is.

12 MR ABBOTT: You say -

13 MS LAYTON: Mr Abbott you are sitting down and I
14 would be grateful if you would keep to yourself. That
15 is the basis upon which we strongly urge for a period of
16 48 hours, the very minimum required to try and deal with
17 a matter as important as this. We are asking for that
18 indulgence on behalf of the Aboriginal Legal Rights
19 Movement.

20 COMSR: I understand that in respect of the
21 evidence which is sought to be led that there is a
22 preliminary issue which has to be determined in any
23 event; that is, as I understand it, whether the evidence
24 can be led. I can see no reason why, at this stage, we
25 can't proceed with that issue. It doesn't require any
26 divulgence of any of the material concerned. I can then
27 consider what you have put over the luncheon
28 adjournment, Miss Layton. But, meanwhile, I think there
29 is another issue which has to be determined in any event
30 that we can relate to this proposed -

31 MR ABBOTT: Can I ask on what basis Miss Layton gets
32 the 48 hours? It would be my submission, having gone on
33 the wheel once, she is unlikely to be given a speedy
34 hearing twice. I would have thought that 48 hours would
35 be duly optimistic, given the Full Court's commitments.

36 COMSR: I have no idea. I'm not suggesting this
37 time that we do anything other than to proceed to hear
38 the question of the admissibility of the evidence. I

1 just suggested that that will leave me the luncheon
2 adjournment to consider it, during which time Miss
3 Layton may well get some idea as to what period of time
4 is involved in any event.

5 MR SMITH: In the light of your ruling, I now seek
6 to tender fully the exhibit marked for identification
7 67.

8 COMSR: I will leave that until after lunch. 67
9 being what?

10 MR SMITH: The folder of media releases.

11 COMSR: Perhaps if we can deal with that after
12 the luncheon adjournment and proceed with the next
13 question.

14 MR SMITH: The problem of admitting is only one.
15 If there is raised a question of admissibility in
16 relation to the tape recorded conversation between the
17 witness Denver and Douglas Milera, it may be that no-one
18 would take objection to it.

19 I seek leave to interpose a witness who addresses
20 that issue, if you like, and you are receiving this,
21 although you are not constrained by any such strictures
22 on the voir dire.

23 MR SMITH SEEKS LEAVE TO INTERPOSE WITNESS DONALD EDWARD
24 McLAREN AND THAT THE WITNESS BE EXAMINED ON THE VOIR DIRE.
25 LEAVE GRANTED.

- 1 MR SMITH CALLS
2 DONALD EDWARD MCLAREN SWORN
3 MR SMITH ON VOIR DIRE
4 Q. I think you are a boat owner, are you not.
5 A. Correct.
6 Q. You presently have a mooring in the marina at Goolwa; is
7 that right.
8 A. That is also correct.
9 Q. That is the marina on Hindmarsh Island itself or over on
10 the Goolwa foreshaw.
11 A. No, on Hindmarsh Island.
12 Q. I think you know Tom and Wendy Chapman, do you not.
13 A. Correct.
14 Q. How have you come to know Tom and Wendy Chapman.
15 A. Through having our boat in the marina on Goolwa -
16 Hindmarsh Island.
17 Q. So that you have come to know Tom and Wendy Chapman from
18 about when was it.
19 A. I think I would've probably had the boat down there now
20 for four and a half, towards five years.
21 CONTINUED

D.E. McLAREN VOIR DIRE
(MR SMITH)

1 Q. You, however, live in Adelaide, do you not.

2 A. Yes, I live at Henley South.

3 Q. In the four and a half or five years that you have had
4 your boat at the mooring at the marina on Hindmarsh
5 Island, do you regularly go down to the boat to use it.

6 A. As often as work commitments permit, yes. We try to get
7 down there at least once a fortnight, sometimes not as
8 frequent, sometimes once a week.

9 Q. I think you know the previous witness in this inquiry,
10 Mr Kym Denver, do you not.

11 A. Yes.

12 Q. Again, how did you come to know Mr Denver.

13 A. Mainly through the activities on the island, the debate
14 on the bridge, the bridge issue.

15 Q. You are in favour of the construction of a bridge, are
16 you not.

17 A. I'm in favour of development in South Australia.

18 Q. So you'd draw a distinction, would you, between the
19 construction of the Hindmarsh Island bridge and
20 development in general.

21 A. Personally, as far as we're concerned, whether the
22 bridge is built or not, we could get around the
23 inconvenience, if you like, of no bridge. But I guess I
24 would have to say I am pro bridge now. I have attended
25 a couple of rallies. But mainly in the interest of
26 development in the State.

27 Q. I think there was an occasion, which Mr Denver has told
28 us was Wednesday evening, 28 June 1995, when a tape
29 recording of a conversation between Mr Denver and Mr
30 Milera took place.

31 A. Correct.

32 Q. You know about that matter.

33 A. I do.

34 Q. On that evening, where were you, Wednesday evening, 28
35 June.

36 A. We were house guests of Tom and Wendy Chapman.

37 Q. How did that come about.

D.E. McLAREN VOIR DIRE
(MR SMITH)

- 1 A. We had our boat at Veenstra slipway. The boat was being
2 stripped down and painted with epoxy resin paint which
3 leaves a lot of fumes and so forth. We were, the
4 previous Sunday, going to book in the hotel while it was
5 on the slip, and we were talking to Tom and Wendy and
6 they insisted we stay there as their house guests.
- 7 Q. I take it from that, you normally reside on your boat
8 when you are down at Goolwa.
- 9 A. Correct.
- 10 Q. So that's you and your wife were house guests at the
11 Chapmans' home that Wednesday evening, 28 June.
- 12 A. We had been there a couple of days before and stayed
13 there a couple of days after.
- 14 Q. Also in the house, apart from Tom and Wendy Chapman, was
15 Mr Denver, is that so.
- 16 A. Correct.
- 17 Q. In connection with the telephone conversation that I
18 have introduced to you a moment ago, about what time did
19 that come into the house or go out, as it were.
- 20 A. I would think somewhere towards quarter to 8, 8 o'clock.
21 We had finished dinner. I didn't get back from the boat
22 until fairly late, so I would think somewhere around
23 approaching 8 o'clock.
- 24 Q. Did you know of a person by the name of Douglas Milera
25 at this time.
- 26 A. I did.
- 27 Q. That was by reason of what having occurred.
- 28 A. I had seen Doug Milera on TV, you know, press reports,
29 photographs and so forth, yes. I knew him.
- 30 Q. What were the circumstances that immediately occurred.
31 Can you relate those to the commission.
- 32 A. First of all, Kym picked up the phone, Tom and Wendy
33 Chapman, at that stage, were in the lounge with the rest
34 of us. Kym had come down with a handful of documents to
35 get some assistance from Wendy Chapman. I'm not sure
36 the precise nature of the documents, but they related, I
37 think, to some award that Kym was seeking on environment
38 conservation, Eagle Award, or something of that nature.

D.E. McLAREN VOIR DIRE
(MR SMITH)

1 At that stage, the phone rang and Kym was advised it was
2 for him. He then said to all of us in the room that it
3 was Doug Milera on the phone. Tom and Wendy Chapman
4 immediately left the room. Kym spoke for, I think, a
5 minute or so with the phone to his ear.

6 Q. Can I interrupt you there. Why did Tom and Wendy
7 Chapman leave the room. Was there an expressed reason
8 for that in your presence.

9 A. No. I don't know. All I do know is that as soon as
10 they realised it was Doug Milera on the phone they
11 vacated the room to a back room.

12 Q. So you got to the stage where Denver has got the
13 receiver. Is that a mobile phone we're talking about,
14 or is it just an ordinary -

15 A. No, it was an ordinary phone.

16 Q. Okay.

17 A. Kym then put the phone down, which put it into a
18 hands-free loud speaking mode. I think mainly because
19 he wanted to get a pen and paper and start to write some
20 notes.

21 Q. Did he do that.

22 A. Yes.

23 Q. So the phone was on loud speaker, was it.

24 A. Correct.

25 Q. Where were you in relation to the phone at this stage.

26 A. I was sitting in a lounge chair near the fireplace.

27 Q. What sort of distance are you from this conversation, or
28 the phone itself.

29 A. 12, 15 feet, I guess.

30 Q. Go on, what happened then.

31 A. The conversation then proceeded with Doug and Kym. I
32 was glancing through a magazine at this stage. But then
33 Doug Milera made a comment that drew my attention to the
34 conversation, mainly because, in the first instance, I
35 thought that Doug Milera was querying whether Kym was
36 taping the conversation. How would I put it - him being
37 concerned that he was being taped, and he repeated it,
38 asking, or insisting that it be taped.

D.E. McLAREN VOIR DIRE
(MR SMITH)

- 1 Q. Can you do the best you can to relate what was said, or
2 the gist of it.
- 3 A. I know one statement, if you like, or part of the
4 conversation I heard was `Kym, are you taping this?'
5 and that was when I first thought `The gentleman is
6 concerned that it is being taped'. He then repeated
7 `Are you taperecording this, Kym? It is important you
8 get it down.' So Kym indicated to me could I go and see
9 Tom to get some tapes, which I did. But on the way out
10 - Doug Milera was at this stage fairly agitated, but
11 very very insistent that what he was saying or going to
12 say should be taken down, recorded - so my wife, who
13 does shorthand, I asked her if she would grab a pad and
14 a pen and get some of the conversation down while I went
15 out and saw Tom Chapman to see what we could do about
16 getting some recording stuff.
- 17 Q. Your wife's name is.
- 18 A. Evelyn McLaren.
- 19 Q. She was in the same room at the same time.
- 20 A. Correct.
- 21 Q. As you left, what was she doing then.
- 22 A. She had got a pad and piece of paper and was starting to
23 take some shorthand on it.
- 24 Q. She is a stenographer, is she.
- 25 A. She had many years of secretarial experience, but she is
26 not a verbatim shorthand - and I know in discussion with
27 her later in the evening she was having some difficulty
28 in the outlines, not being conversant, if you like, with
29 some of the terminology that was being used, but she did
30 make an attempt to get it down.
- 31 Q. So you went out of the room then, did you.
- 32 A. Correct.
- 33 Q. Were Tom and Wendy Chapman still in the house.
- 34 A. Yes. They were in the dining room, as I recall.
- 35 Q. What happened then.
- 36 A. Tom grabbed - Tom Chapman grabbed some small tapes
37 because I saw them in his hand. He took those in to
38 give to Kym to set up the recorder. I went out to the

D.E. McLAREN VOIR DIRE
(MR SMITH)

- 1 vehicle to get a packet of cigarettes and came back in.
- 2 Q. Looking at MFI 63, you do not have to take them out of
3 the envelope, but is that the size of tape that was
4 produced to you by Mr Chapman.
- 5 A. Yes. They were not the normal cassette tape. I would
6 say that they were very similar.
- 7 Q. Did you then set the recording up, or did you leave that
8 to somebody else.
- 9 A. No, I didn't set the recorder up.
- 10 Q. You were present then when this equipment was brought
11 back to the telephone, were you.
- 12 A. Correct.
- 13 Q. Was the conversation ongoing when you got back there.
14 In other words, was Denver and Milera talking when you
15 got back into the room.
- 16 A. Yes, they were.
- 17 Q. And your wife purporting to record it.
- 18 A. Correct.
- 19 Q. Were you present during the rest of the conversation
20 that took place between Denver and Milera.
- 21 A. Most of the evening. Although, periodically I went out
22 to make coffee for the three of us that were still in
23 the room, being Kym Denver, my wife and myself.
- 24 Q. I think towards the end of the conversation, Milera made
25 a request of Denver, did he not, for a six pack and some
26 cigarettes.
- 27 A. Correct.
- 28 Q. I think you were involved in delivering just that to Mr
29 Milera, weren't you.
- 30 A. That is also correct.
- 31 Q. The conversation, you told us, took place shortly before
32 8 o'clock, about quarter to 8.
- 33 A. To the best of my recollection at that stage, that is
34 correct.
- 35 Q. When did you leave the Chapman house that evening.
- 36 A. I think it would have been around 11 or very shortly
37 after 11 o'clock. I was concerned in being able to find

D.E. McLAREN VOIR DIRE
(MR SMITH)

- 1 somewhere that was open in Goolwa at that time to get
2 the cigarettes for Doug Milera.
- 3 Q. What about the six pack.
- 4 A. I already had the six pack in the spare fridge, if you
5 like to call it, in the lobby of the Chapmans' home. I
6 had already put a carton in there in the beginning of
7 the week. Sanding a boat is dusty work. That's my
8 excuse, anyway.
- 9 Q. The conversation on the telephone lasted, in your
10 estimation, how long.
- 11 A. It seemed to go on forever and ever, but I would think
12 two and a half hours, or longer even. It was a very
13 very long telephone call.
- 14 Q. You set off to make this delivery.
- 15 A. Correct.
- 16 Q. About what time.
- 17 A. As I say, I believe it was probably just after 11. I'm
18 pretty sure that I looked at my watch as I waited for
19 the ferry, and it was 8 minutes past 11, and I thought
20 'I'm not sure where I'm going to get cigarettes this
21 time of night'.
- 22 Q. You had the six pack. Did you get the cigarettes.
- 23 A. I did. I got the cigarettes and a box of matches from
24 the Corio Hotel.
- 25 Q. You had directions to Milera's house, did you.
- 26 A. Kym Denver had drawn me a map.
- 27 Q. Can you tell us approximately where Milera's house was.
- 28 A. I turned off the Victor Road into Beach Road. I
29 probably went in a kilometre and a half - the name of
30 the street that I turned off to the right, I can't
31 recall, but, having turned into that street which went
32 back out in an acute angle, or a reasonably acute angle,
33 I believe I took the first on the right into that
34 street, and then went round in a crescent shape type
35 road or a road that would have been in that shape.
- 36 Q. It was a house in Saxton Street.
- 37 A. Correct.
- 38 Q. What time would you have arrived there.

RF 23B

D.E. McLAREN VOIR DIRE
(MR SMITH)(MR TILMOUTH)

- 1 A. I had to wait to be served in the Corio. I would say
2 shortly before 11.30 or thereabouts. I'm not quite sure
3 of the precise time.
- 4 Q. I take it then you, armed with the six pack, the
5 cigarettes and the matches, went to the front door and
6 knocked on the door.
- 7 A. I did.
- 8 Q. Who answered the door.
- 9 A. Doug Milera came to the door. When I arrived I could
10 see, through the front window, that he was on the
11 telephone. I tapped once and then tapped the second
12 time a bit louder. He came across to the door. I just
13 simply said that I was asked to make this delivery to
14 him, that I had cigarettes as well, and, me being a
15 smoker, I bought a box of matches because cigarettes
16 without matches are frustrating. He said that - words
17 to the effect `Sorry I can't stay with you' or `talk to
18 you' or something more, whatever `I'm on the phone to
19 Channel 10'.
- 20 Q. He took then the possession of the six pack and the
21 cigarettes and left you at the door.
- 22 A. I saw him walk back across to the phone and I left.
- 23 Q. Was Douglas Milera sober when he spoke to you at the
24 door.
- 25 A. I would say yes.
- 26 MR TILMOUTH ON VOIR DIRE
- 27 Q. Do I understand your evidence to be that this telephone
28 call was received at about 8 p.m. that night,
29 approximately.
- 30 A. Somewhere in that area, yes.
- 31 Q. Is it the position that Denver actually answered the
32 phone, or did somebody take the receiver first.
- 33 A. I'm not too sure. I would have thought that Kym took
34 the phone call himself, but, as I said, I was glancing
35 through a magazine.
- 36 Q. You did say, according to my note, that somebody said
37 that the telephone call was for Kym. Can you remember
38 who said that.

D.E. McLAREN VOIR DIRE
(MR TILMOUTH)

- 1 A. No, I can't.
- 2 Q. Can you tell us in what context that arose.
- 3 A. I'm not quite sure of your question.
- 4 Q. Did it appear as if it was pre-arranged, or it just
- 5 happened that the call came in when Kym was there.
- 6 A. No, I -
- 7 Q. From what you heard and saw.
- 8 A. No, my reaction to that was that Kym was surprised that
- 9 he had been - a phone call had been directed to the
- 10 Chapmans.
- 11 Q. You got that impression from Kym's manner, no doubt.
- 12 A. Correct.
- 13 Q. You talked about taping equipment. How long into this
- 14 phone call was the taping equipment brought into the
- 15 room.
- 16 A. It's a little hard to say because everything happened in
- 17 a hurry. There was an urgency attached to it. I would
- 18 think somewhere between maybe five and ten minutes. I
- 19 really can't put a finite time on that.
- 20 Q. Who brought it into the room.
- 21 A. Tom Chapman.
- 22 Q. The conversation was taped eventually, was it.
- 23 A. Correct.
- 24 Q. How long do you think. Was it another five minutes or
- 25 so. Are we talking a few minutes. Are we talking a
- 26 half an hour.
- 27 A. Before the taping was started?
- 28 Q. Yes.
- 29 A. I would think ten minutes. Not much more from when that
- 30 was requested to when it was actually being taped.
- 31 Q. In the meantime, the phone conversation was on loud
- 32 speaker, is that right.
- 33 A. Correct.
- 34 Q. Did it continue on loud speaker after the taping
- 35 commenced.
- 36 A. Correct.
- 37 Q. Can you help us how it was taped. What actually was
- 38 done with the taping equipment to tape it.

RF 23B

D.E. McLAREN VOIR DIRE
(MR TILMOUTH)

1 A. No. I didn't see the tape recorder device myself. It
2 was up the front near the computers, near the phone,
3 which is up against the window at the front of that
4 particular room.

5 Q. So you are not able to help us at all by what means the
6 taping equipment was used to actually record the
7 conversation.

8 CONTINUED
9

D.E. McLAREN VOIR DIRE
(MR TILMOUTH)

- 1 A. No, I didn't see the actual device or type of device it
2 was. I don't know.
- 3 Q. When were you asked to obtain the six pack and the
4 cigarettes for Milera.
- 5 A. Several times during the conversation Doug Milera asked
6 for a six pack. He said, you know, 'I need a drink',
7 etc., but I was asked to make the delivery at the end of
8 the conversation.
- 9 Q. This is, what, at about 11 o'clock or so, is it,
10 approximately.
- 11 A. I believe so.
- 12 Q. The question of procuring the six pack and the
13 cigarettes was initiated by Milera, during the phone
14 call.
- 15 A. Correct.
- 16 Q. And repeated a number of times during the evening.
- 17 A. Correct.
- 18 Q. You told us you delivered a six pack, which you had with
19 you, or was it at the house.
- 20 A. I had a spare six pack in the second fridge in the
21 Chapmans' home.
- 22 Q. And what about cigarettes, you bought them somewhere on
23 the way, did you.
- 24 A. I bought those from the Corio Hotel.
- 25 Q. How many cigarettes did you deliver.
- 26 A. One packet.
- 27 Q. You paid for those yourself, did you.
- 28 A. I did.
- 29 Q. Or did somebody give you money for them.
- 30 A. No, I paid for them.
- 31 Q. I suppose you are not able to help us how many times
32 during the conversation Milera raised this subject
33 matter of the drink and the cigarettes, except that it
34 happened on several times.
- 35 A. Bear in mind I have said I was in the other room on a
36 number of occasions, but I would have heard it on two or
37 three occasions.
- 38 Q. Are you able to help the Commissioner as to when it was

D.E. McLAREN VOIR DIRE
(MR TILMOUTH)

- 1 first raised. Was it raised early, say, during the
2 middle of the conversation. If it is only guessing, you
3 say so.
- 4 A. Yes, I can't really recall.
- 5 Q. What about the question of the statement made `Kym, are
6 you taping this?', when did that occur.
- 7 A. Very early in the conversation.
- 8 Q. Did that occur in your recollection at the time the
9 recording equipment was brought in, before, sometime
10 later.
- 11 A. The recording equipment was brought in following Doug
12 Milera's request that `Is it being tape recorded and
13 being taped?'
- 14 Q. Your recollection is that this question was therefore
15 raised before the recording equipment was operating.
- 16 A. Correct.
- 17 Q. Are you able to help the Commissioner as to whether the
18 question of the recording of the conversation was raised
19 during the actual recording itself later.
- 20 A. On a number of occasions.
- 21 Q. On a number of occasions, in your recollection.
- 22 A. On a number of occasions in my hearing, while I was in
23 that room.
- 24 Q. When you understood the recording equipment was then
25 functioning.
- 26 A. Correct.
- 27 Q. By the way, have you heard any of these tapes since.
- 28 A. I have not.
- 29 NO FURTHER QUESTIONS
- 30 WITNESS RELEASED
- 31 MR SMITH: I recall Mr Denver to the witness box.
- 32 COMSR: This is on the issue of the -
- 33 MR SMITH: Yes, I will go as far as we can.

K.D. DENVER XN (MR SMITH)

1 WITNESS K.D. DENVER, ENTERS WITNESS BOX

2 EXAMINATION BY MR SMITH CONTINUING

3 Q. Can I take you back to the evening of Wednesday evening,
4 28 June, when you had a telephone conversation with
5 Douglas Milera. And I think you told us, on the last
6 occasion you were giving evidence, that you had to
7 eventually call him back, because his phone was STD
8 barred.

9 A. Yes, I just heard what was said then. I did receive the
10 phone call at Chapmans', but the phone call wasn't from
11 Doug. Doug rang my home number, my wife took the
12 message, gave Doug my mobile number and said `You ring
13 him yourself.' Doug rang her back again and I said `My
14 phone is STD barred, I can't ring him on the mobile, can
15 you get him to ring me?' My wife rang Chapmans, because
16 she knew I was there, as he said, getting some documents
17 prepared. I asked - and that was when, of course, Wendy
18 Chapman answered her own telephone. It was for me. She
19 put me on. And then I asked Tom and Wendy, as I said
20 the other day `Can I use your phone, I need to ring Doug
21 Milera?' And, as I said the other day, they high tailed
22 out of it. And, at this stage, it was just Wendy and
23 myself in the corner of the room trying not to interfere
24 with the other house guests, because we were just typing
25 up stuff that was really none of their concern or didn't
26 want to ruin their evening.

27 Q. As to the question of a phone call and the recording of
28 it etc., I want to ask you some questions about that
29 topic. When you initially spoke to Douglas Milera, can
30 you tell us whether the topic of recording the
31 conversation, either tape recording or recording it by
32 some other means, was raised early in the conversation.

33 A. Yes, I rang Doug and Doug was in a house in Sexton
34 Street, as he said. Everything, all the furniture and
35 everything was moved from the house. The only thing
36 that was left was him and the phone. He made a point of
37 that several times during the conversation. He also
38 said that he wanted to tell me as much as he could

K.D. DENVER XN (MR SMITH)

1 before they shifted him, meaning he had, as far as I
2 could see, that the Aboriginal Legal Rights were
3 shifting him to Adelaide.

4 Q. Did he actually say that, or have you deduced that.

5 A. We spoke for probably quite a few minutes before we
6 began taping. He told me that he was being shifted,
7 that's why the house was empty. They had packed up,
8 they were being shifted out. He was frightened he was
9 about to be nobbled. His story would change. He was
10 being pressured. Sarah was being pressured. He needed
11 to tell me as much as he could before they got at him.
12 He asked me to record what is happening, to take it
13 down. As I indicated the other day, I told him I was in
14 Adelaide, because I didn't want to get hooked into
15 having to visit him again. He said `Have you got that?
16 Have you got that?', time and time again, he asked me to
17 record it. At this point, the Chapmans were gone. I
18 said to Mrs McLaren `This guy wants me to take all this
19 down. How can I? I can't. I don't do script.' I
20 didn't have a tape recorder or anything. She offered,
21 because she could do the script, as Mr McLaren said.
22 And she proceeded to write as best she could under the
23 circumstances what was being said. That's when I put it
24 on the loudspeaker. Initially it was just me, then it
25 was on the loudspeaker and he said that, you know, he
26 wanted it recorded. I said the other day I don't know
27 whether the guy specifically said `I want it tape
28 recorded', or `I want it recorded', or `Have you got
29 this on tape?', or whatever. He wanted it taken down.
30 He wanted it recorded. He repeated that over and over.

31 Q. The conversation went in three stages. There was you
32 and Doug Milera just talking normally on a hand piece
33 telephone.

34 A. On a closed line.

35 Q. On the closed line. Then.

36 A. On an open line with Mrs McLaren trying to get it down
37 as best she could until, as Mr McLaren said, he wanted
38 it taped. And, of course, we were in the Chapmans'

K.D. DENVER XN (MR SMITH)

1 house, so, Mr Chapman brought in the tape recording
2 gear, which was a Dictaphone thing. I don't know
3 whether it had its own mike or it was a condenser
4 microphone, which we just left next to the speaker
5 phone, so, we were just talking like this. It picked it
6 up and Mr Chapman then withdrew from the room until, as
7 it shows on the tape, if we ever get to play it, that we
8 had a drama, because we came to the end of the tape.

9 Q. There was no plugging into the phone.

10 A. No.

11 Q. It was just -

12 A. It was just alongside the phone. The woman tried to
13 keep up, Mrs McLaren tried to keep up taking script
14 while we did it. As you saw, they were those small
15 tapes. The conversation lasted longer than what I ever
16 thought. It came to the end of the tape. While we were
17 working out how to open the thing and turn it over, she
18 just took the notes, which was only briefly and then
19 that side finished and there was a bit of kerfuffle to
20 get another tape. And the Chapmans didn't return until
21 such time as it was obvious the phone call was closing
22 down. And so they would have -

23 Q. You caused a transcript of the conversation to be made,
24 did you not.

25 A. Yes, that's correct. It was, as Mr McLaren said, it was
26 very late when we had finished that day. He went to
27 Goolwa, because I had said I was in Adelaide and I
28 didn't turn up with a six pack for the fellow. We
29 thought we would do the right thing, send his six pack
30 around, because he may have wanted to contact us again.
31 At this stage, I had realised that he was actually
32 giving me something that may be useful. McLaren went
33 towards Goolwa and I went towards home, because I was -
34 it was a working day the next day.

35 Q. Looking at the transcript produced to you, do you
36 recognise that as the transcript prepared of the
37 conversation, as much as you could record, between
38 yourself and Mr Milera.

K.D. DENVER XN (MR SMITH)

1 A. Yes, this is, that's correct.

2 Q. Just looking at that document, for a moment, p.1 to

3 p.1.4.

4 COMSR: I don't want to know any of the contents
5 of it, Mr Smith.

6 XN

7 Q. It is the conversation I think as best could be recorded

8 taken by Mrs McLaren, is that right.

9 A. Yes, I think up here (INDICATES) not on the paper is our
10 closed conversation. 1 to 1.4 is what Mrs McLaren took
11 down as script. That's why it is a bit dodgy. And then
12 from there until the very end is word for word from the
13 tape all bar a few `yeahs', `buts' and things like that.
14 And some of the more colourful language is just left
15 out.

16 Q. Can you tell us what steps were taken to compile that
17 transcript of the telephone conversation that you have
18 in front of you.

19 A. Mrs McLaren went back over what she had written down - I
20 didn't understand the script - to get it as best she
21 could, which has got quite a few words missing. Then
22 the next - this is dated actually the next day after the
23 conversation. Mrs McLaren just went through her - what
24 was written down and what was on the tape and just typed
25 up this for me so as I had a full record of it, so I
26 could see what had actually, you know, taken place the
27 night before.

28 Q. Did you check that against, first of all, your
29 recollection of the conversation in respect of pp.1 to
30 1.5.

31 A. Yes, not immediately. Later, once all this Commission
32 business came up, I soon went and dragged out everything
33 that I ever had and checked it then.

34 Q. Did you check through the transcript as against the
35 tapes.

36 A. Yes, it is virtually word for word, as I said, there is
37 a couple of things like `yes' or `yeah' or whatever,
38 that - my replies that aren't in here. There is a

K.D. DENVER XN (MR SMITH)

- 1 couple of shorts sentences that were left out, which are
2 clearly audible. I mean, you could hear them on there.
3 Nothing of context. It was just `Yeah, yeah, yeah.'
4 Well, you wouldn't write that three times, just put it
5 once, things like that.
- 6 Q. You satisfied yourself that the tape was accurately
7 reflected in the transcript.
- 8 A. Yes, reading this and listening to the tape, there is
9 nothing you wouldn't pick out.
- 10 Q. There are some pencilled alterations on that transcript
11 which you have in your hand, and they are made by whom.
- 12 A. On the front cover of p.1, I don't think this will hurt,
13 things like `read' to `road', just little things like
14 that that Mrs McLaren has typed up. Like, as I said,
15 the word `read' instead of `road'. And then she has
16 gone over and checked it and just corrected little
17 things like that.
- 18 Q. So, the handwriting on the document is whose.
- 19 A. On the front is Mrs McLaren's filling it in. There is
20 one - I have got the original, it is in pencil, at p.2,
21 I have written in `Yeah.' And another little bit down
22 further just in pencil, that is my writing.
- 23 Q. You told us from time to time in the conversation you
24 had with Mr Milera he made mention of whether you were
25 recording it, whether you were getting it all, is that
26 right.
- 27 A. Yes, he must have said from the time he rang up to the
28 time we finished he must have said it twenty times. I
29 mean, he wanted it recorded. Most of the time he said
30 it to me when we were in the closed conversation. Then
31 he repeated it when we were doing it on script. And, if
32 we ever get to hear the tape, I am sure he has mentioned
33 it in the type, as well. So, it is on there as clear as
34 clear.
- 35 Q. Just let's go to that. If you go to p.5.9 of your
36 transcript, we have somewhat of a mention of that topic
37 there at the bottom of p.5.9, do we not. `I want to get
38 this story out, the truth, before they start'. Have you

- 1 got that, at the bottom of p.5.
2 A. Yes.
3 Q. Is that correct, that Doug Milera said that to you as
4 you have recorded it at the bottom of p.5.
5 A. Yes, this - as I said, play the tape. It is exactly
6 word for word.
7 Q. Then, at the bottom of p.6, is that topic raised again,
8 the question of recording it, in some way.
9 A. Can you point it out to me?
10 Q. Yes, four lines up from the bottom of p.6.
11 A. Yes.
12 Q. What is there.
13 A. Once again he asks `Have you got all that?'
14 Q. Then could we go over to p.13, getting towards the end
15 of the conversation, at the top of p.13, again, is that
16 noted up correctly there, that transcript to record that
17 Milera said to you `I'm not doing this for anyone. I am
18 doing this for my own self. I can hold my head up and
19 say I've spoken the truth.'
20 A. That's correct, it is clearly audible on the tape.
21 Q. Again at about .3 you have recorded that Milera said to
22 you `I'm glad I spoke to you anyway and put you in the
23 picture and told you everything that more or less I
24 still have some more up my sleeve.'
25 A. That's correct.
26 MR SMITH: We have reached the stage where I
27 propose tendering the transcript, or at least having it
28 marked, at this stage.
29 COMSR: Perhaps it would be advisable to leave
30 that until after the luncheon adjournment?
31 MR SMITH: Is that for the purposes of you
32 considering Ms Layton's submission, is it?
33 COMSR: I have indicated to Ms Layton that we
34 would be dealing with the preliminary issue this morning
35 and that I will consider what she had to say over the
36 luncheon adjournment. It seems to me that if you tender
37 the transcript it may well contain the passages which
38 are in issue, that is the only thing.

K.D. DENVER XN (MR SMITH)

- 1 MR TILMOUTH: If you are considering that over the
2 luncheon adjournment could I suggest you would need to
3 be satisfied that the conversation as recorded is not
4 contrary to s.7 of the Listening Devices Act.
- 5 COMSR: That argument has to be addressed to me,
6 in any case. I mean, this is a preliminary issue,
7 whether or not the tape recording itself is admissible.
- 8 MR TILMOUTH: That's right. I turn your mind to that
9 question without saying any more, at the moment.
10 Could I ask a point of clarification?
11 Does what is proposed to be tendered include the
12 initial conversation between Mr Denver and Mr Milera on
13 what I think Mr Denver called the closed conversation?
14 I wasn't clear what it was.
- 15 COMSR: Whether it contains only the transcript
16 of the tape recording or whether it includes the
17 conversation which took place in the closed call?
- 18 MR TILMOUTH: That's right.
- 19 COMSR: And, in addition, that which took place
20 and was taken down in shorthand by Mrs McLaren?
21 CONTINUED

K.D. DENVER XN (MR SMITH)

1 MR TILMOUTH: That's right. My understanding is that
2 it includes Mrs McLaren's notes until the tape recorder
3 was set up and then the tape recorder - I wasn't sure
4 about the closed part.

5 MR SMITH: It is clear that - Mr Denver's made it
6 clear that the conversation, the closed part of the
7 conversation before the telephone was put on loud
8 speaker, is not there. The first section is Mrs
9 McLaren's shorthand, the next section is the tape. At
10 least that should be identified, marked for
11 identification in the transcript.

12 MR ABBOTT: Can I suggest that we hear Mr Tilmouth
13 on anything under the Listening Devices Act between now
14 and 1 o'clock?

15 COMSR: I propose to listen to argument
16 concerning the admissibility then.

17 MR SMITH: Could that be marked, as the witness has
18 referred to it and it is part of it. It is relevant to
19 this voir dire issue.

20 MFI 68 Transcript of telephone conversation
21 marked 68 for identification.

22 MR SMITH: Could I add, bearing in mind that you
23 are not constrained by the rules of evidence in this
24 inquiry, that the Commission has in its possession a
25 further tape recording of Mr Milera taken by a witness
26 who will be giving evidence in this Commission, Mr
27 Kenny, Mr Chris Kenny from Channel 10, in which the tape
28 recording and the transcript shows that at about 10.30
29 on this evening of 28 June, there was a conversation
30 between Mr Milera and Mr Kenny. The transcript of that
31 conversation and the tape recording of that conversation
32 shows a specific consent to the conversation being tape
33 recorded.

34 In the normal course of a trial, I would, on this
35 voir dire, lead that evidence because it's relevant to
36 the question of whether - although it is unnecessary, in
37 my submission, as the evidence is quite categorical
38 here, it is, none the less, relevant to whether the

1 question of whether Mr Milera was wanting to be recorded
2 by the people he was speaking to on that evening.

3 Bearing in mind the flexibility that you have, I
4 tell you that the Commission has that material in its
5 possession which will be the subject of evidence.

6 COMSR: Can the witness stand down for the time
7 being.

8 WITNESS STANDS DOWN

- 1 COMSR: I take it, Mr Smith, your contention is
2 that the tape recording is admissible.
- 3 MR SMITH: I think it is beyond debate that this
4 recording does not infringe either the Commonwealth Act
5 or the State Act, and I won't say anything more about
6 it.
- 7 COMSR: You mean `at this stage'. Do you wish
8 to be heard on this matter Mr Tilmouth?
- 9 MR TILMOUTH: If I could. I will be short. I'm not
10 sure, of course, how far or how little this conversation
11 will affect my client. That will be revealed in the
12 contents. This submission is perhaps not so much to
13 assist my client as to assist the Tribunal. You must be
14 satisfied that what you are receiving is a lawfully
15 taped conversation.
- 16 My understanding of the way the Telecommunications
17 Act of the Commonwealth is, is that it would only
18 prohibit the receipt of material into evidence before
19 any Tribunal that is actually recorded over a
20 telecommunications service. Unfortunately, I didn't
21 bring the Act down. I wasn't expecting this. I
22 remember this from other cases. It actually has to be
23 electronically recorded and, of course -
- 24 COMSR: An interception of it.
- 25 MR TILMOUTH: That's right. So that if the tape
26 recorder was just placed alongside, as I understand it,
27 the loud speaker - my understanding is correct according
28 to Mr Smith, placed next to the loud speaker, it would
29 not have been over a telecommunications system.
- 30 Assuming that is right, my submission is directed to the
31 State Listening Devices Act.
- 32 COMSR: That is the only evidence before me.
- 33 MR TILMOUTH: That is.
- 34 COMSR: That is the way in which it was
35 recorded.
- 36 MR TILMOUTH: You have to Act on the basis of that
37 evidence, without evidence of anything to the contrary.
38 I'm not producing evidence on it because I don't

1 represent parties here. Does your Honour have a copy of
2 the Listening Devices Act?

3 COMSR: Probably of the relevant pages.

4 MR TILMOUTH: Madam Commissioner, the prohibition - I
5 will go through the three key sections which are the
6 prohibitions. The primary prohibition is contained in
7 s.4 which, to paraphrase it, provides that a person
8 shall not intentionally use a listening device to
9 overhear, record, et cetera, any private conversation,
10 whether or not he is a party thereto without the
11 consent, express or implied, of the parties.

12 The evidence led here prima facie shows consent by
13 both parties. Nevertheless, a breach of the section is
14 serious not only in terms of evidentiary exclusion but
15 because it provides a criminal penalty, including
16 imprisonment, which is quite serious.

17 The next section and really the key one is s.7
18 which, in my submission, has both criminal and civil
19 implications. It provides that s.4 does not apply; that
20 is, the section which prima facie excludes a
21 conversation between a non-consenting party or parties.

22 It says:

23 `Does not apply, (a) where the listening device is used
24 to hear or monitor or listen to a private conversation
25 to which that person was a party.'

26 This was, I suppose, on considering whether it was a
27 private conversation. Essentially, in my submission, it
28 was and that would be the best way of dealing with it.
29 Other people were plainly about the place, but Mr
30 Denver's evidence was that it was he and Milera
31 essentially there. The Act goes on:

32 `(b) In the course of the duty of that person, in the
33 public interest or for the protection of the lawful
34 interests of that person.'

35 `(b)' is the key provision.

36 In my submission, to be received, it must be shown
37 that this was in the public interest or in the
38 protection of the lawful interest of Denver to receive

1 the conversation. In my submission, just a general
2 interest as a landowner on Hindmarsh Island and a person
3 to whom Douglas Milera was speaking or seeking out at
4 that stage is insufficient for that person.

5 COMSR: Would it be sufficient for that purpose
6 if, as I understand the evidence of Mr Denver, he, at
7 that time, had been subjected to a deal of adverse
8 comment, as it were, concerning the Hindmarsh Island
9 matters and that he wished to protect himself, as it
10 were, from misrepresentation of any conversations that
11 he had?

12 MR TILMOUTH: I'm not sure about that. But as I
13 understand the sine qua non of the receipt or the
14 recording of it, this was at Milera's request. Denver
15 appears to be quite neutral and he hasn't claimed any
16 privilege, if I put it that way.

17 I'm not making a direct submission as I might if I
18 were acting for a party concerned. What I say is that
19 you have to be satisfied that sub.s.7(b) is made out;
20 and the reasons for that, of course, are that sub.s.2,
21 prevents the communication, publication of the
22 information or material derived from the use of the
23 listening device under sub.s.1.

24 Now that is why I submitted earlier that it has
25 civil as well as criminal consequences. In my
26 submission, sub.s.2 is directed more towards the civil
27 side and it's a communication or publication which
28 would, of course, include giving the evidence in
29 relation to it. It's a `divulgence', if you would like
30 to use the word that has been used this morning.

31 Madam Commissioner, without making a specific
32 submission, you must be satisfied that it was in the
33 duty of Denver or in the public interest or for the
34 protection of lawful interests of him that the recording
35 was made before and can be received in evidence.

36 MR SMITH: If there is no consent.

37 MR TILMOUTH: Indeed, irrespective of the consent.
38 Because although the primary prohibition in s.4 is

1 removed, if there is mutual consent, nevertheless, there
2 must be the consent is immaterial to the question of
3 whether or not it's in the public interest. Perhaps it
4 could be said that the fact that there is mutual consent
5 is the factor to take into account. It could hardly
6 remove the prima facie prohibitions. The concept is
7 fairly early irrelevant to that purpose.

8 COMSR: I don't know if anyone else wants to be
9 heard before you address me?

10 MR SMITH: If I'm gleaning Mr Tilmouth's argument
11 correctly, then there is a problem which s.4 sets out.
12 As you have got in front of you, one of the ingredients,
13 if you like, is the lack of consent. If there is a lack
14 of consent expressed or implied, then, none the less,
15 the court can go to the exercise of a discretion and
16 then the questions of the public interests and the
17 protection of lawful interests then arise. If there's
18 consent, you don't have to move to a consideration of
19 that question. Have I understood Mr Tilmouth's
20 argument?

21 COMSR: I think what Mr Tilmouth is saying is
22 that s.4 relates to the use of the listening device to
23 record, and you can't do that without the consent of the
24 person. S.7 goes to the question of divulgence.

25 MR TILMOUTH: That's right. That is my point.

26 COMSR: S.4 does not apply -

27 MR SMITH: S.7 does not operate if there is
28 consent, because it's not a question then if there is
29 consent of it being excluded at all.

30 COMSR: That, I understood, to be the thrust of
31 Mr Tilmouth's argument.

32 MR SMITH: If you have a slightest hesitation about
33 that, I will lead some more evidence from Mr Denver to
34 address the question of public interest and his lawful
35 interest. He has already given some evidence about
36 that. My submission to you is that you don't need to
37 trouble yourself about that topic. Could Mr Tilmouth
38 perhaps spell out his argument that s.7 applies even if

1 there is specific consent. Is that your argument?
2 MR TILMOUTH: Yes. S.7(2) applies even if there is
3 specific consent. There is an overriding obligation for
4 the courts to be satisfied that the communication or
5 publication is justified. I think from what you have
6 said arguendo to Mr Smith, you understood my argument.
7 MR SMITH: I don't agree with that argument.
8 COMSR: I don't know whether you want to address
9 me now on any authorities you have, or leave that until
10 after the luncheon adjournment? Are you in a position
11 to address me on that now?
12 MR SMITH: I have addressed you on it. It's plain,
13 but if you are attracted by that argument at all, then I
14 will recall Mr Denver to the witness box to address the
15 matters of discretion that are in s.7. Perhaps I had
16 better do that now so that the matter can be disposed of
17 first thing after lunch.

K.D. DENVER XN (MR SMITH)

1 WITNESS K.D. DENVER CONTINUING

2 EXAMINATION BY MR SMITH

3 MR SMITH: It's plain on the language that s.7
4 cannot have any work to do if there is consent.

5 Q. In your evidence you recounted to us how, on the evening
6 of 5 June 1995, you were involved in the videoing, if
7 you like, or the videoed interview between Chris Kenny
8 and Channel 10 and Douglas Milera at the Appollon Motel.

9 A. Yes.

10 Q. And the prelude was you meeting Doug Milera about a
11 quarter to three at the Middleton Tavern.

12 A. Yes.

13 Q. And later going on up to the motel.

14 A. That's correct.

15 Q. And then, I think, the results of that interview went to
16 air on the Channel 10 News on the following evening, 6
17 June; is that correct.

18 A. That's correct.

19 Q. In the weeks following the Channel 10 News, was there
20 any reaction against you and the community about the
21 path you followed, or were you identified as playing a
22 part in that incident and was there any reaction against
23 you in the community in respect of it.

24 A. It's a fairly small, close community. I think they knew
25 before I got home.

26 Q. What sort of things happened and when did they happen in
27 relation to the Channel 10 News.

28 A. I said earlier that Mr Milera was left at the Grosvenor
29 Hotel. One of the local reporters was in the local
30 hotel, or cameraman for the local newspaper. Milera was
31 there bragging about the fact that all of a sudden he
32 had money and does anybody want to have a drink and what
33 have you. The story came out that apparently he had
34 been with Channel 10. It nearly raced me home, because
35 I had the primary school involved with a media coverage
36 virtually a day or so later from whatever is on the
37 record, and it was the same cameraman and news crew and
38 they said to me about, you know 'What are you up to?'

- 1 and insinuated what the rest of the press did that
2 obviously I was trying to get in good with Tom Chapman.
3 If you could ever play the tape, that will show I'm not.
- 4 Q. When you had that conversation then with Douglas Milera
5 on the evening of 28 June 1995, the topic of the taped
6 conversation that we're now up to, as it were, what did
7 you have in mind in part when you were involved in
8 recording this conversation.
- 9 A. Well, he asked me to record it. And I was mentally
10 recording everything he was saying because I thought I
11 might be - might need it the way things were looking.
12 When he insisted Mrs McLaren took it down, when he
13 continued to insist we had it on tape - and at the time
14 the tape will indicate that I was just along for the
15 ride for the first part of the tape - and then I
16 realised that I would be able to use some of this stuff
17 perhaps, and I encouraged Milera by relevant questions
18 to, in fact, clear me; because on many occasions the
19 anti-bridge movement had tried to smear me over and over
20 again.
- 21 Q. Going back a little bit in time. When you set off on
22 that afternoon of 5 June 1995 to meet Douglas Milera,
23 eventually the two of you went to the Middleton Tavern.
- 24 A. Yes.
- 25 Q. You said in your statement, Exhibit 57: 'When I was on
26 my way out, I saw my father and told him just in case I
27 didn't come back'.
- 28 A. That's correct.
- 29 Q. Did you have any apprehension, if I can put it that way,
30 or was it -
- 31 A. No. We have these green environmentally friendly
32 conscious group of people and by the same token they
33 threatened my life, my family and me personally. The
34 two really don't go together. I was covering my own
35 tail.
- 36 Q. So did you consider it important then to have a record
37 of this conversation with Mr Milera.
- 38 A. Yes. I was fairly keen once the taping began to have

K.D. DENVER XN (MR SMITH)

1 all of this down. Something further I've recalled: The
2 day that we had the second rally on the back of the
3 truck one, I had been to the local police station and
4 they know for a fact that I had requested a flack jacket
5 because it had got to that stage. That is in their
6 record. So it was to my benefit to have anything I
7 could to clear me.

8 CONTINUED

K.D. DENVER XN (MR SMITH)

1 Q. Before the taping, were you alert to anything that might
2 help you vindicate your position that you saw in that
3 matter.

4 A. I'm not quite -

5 Q. That is, as to making a record of what Doug Milera's
6 position really was, if he spoke to you.

7 A. Before Doug Milera came along, I was at the stage where
8 - the Kumarangk coalition had printed a pamphlet making
9 me look bad, various other media made me look bad - I
10 was collecting anything I could that proved that this is
11 a load of rot. Irrespective of my view on the bridge, I
12 was being painted as a bad guy, and if we ever listen to
13 the tape, I have given the guy the way out of it, the
14 same as Channel 10, the whole lot. I have said to him
15 over and over again, it is on the record the other day:
16 If he wanted a way out just tell them to stick it. I
17 hadn't realised at that stage he was going to change his
18 mind, of course.

19 ADJOURNED 12.56 P.M.

1 RESUMING 2.18 P.M.

2 COMSR: My ruling on Section 35 has been given
3 this morning, and, accordingly, the application that
4 this commission adjourn the inquiry is refused.
5 Accordingly, I propose to receive MFI 67, which is the
6 bundle of media and press reports, into evidence as
7 Exhibit 67, and make a ruling as to the admissibility of
8 the tapes of conversation between Mr Milera and Mr
9 Denver.

10 I am satisfied that Douglas Milera did consent and
11 wished that he be recorded. The recorded conversation
12 makes repeated reference to the wish to be taken down or
13 recorded. Both Mr Denver and Mr McLaren have asserted
14 that such was the case. I accept the evidence of Mr
15 McLaren that there was specific mention of the taping of
16 the conversation.

17 It is notable also that later on that day, Mr Milera
18 spoke to the journalist, Mr Kenny, on the telephone and
19 that telephone conversation was in similar vein, and was
20 tape recorded by Mr Kenny, with Mr Milera specifically
21 giving recording consent. I should mention that I have
22 been told by counsel assisting that such evidence will
23 be forthcoming from Mr Kenny, including the audio tape.
24 It is not before me now. I intend to accept that
25 assurance from counsel assisting rather than embark upon
26 a voir dire on this issue at this time.

27 In any event, this later conversation is not crucial
28 to my ruling. If need be, I would exercise the
29 discretion reposed in me in section 7 of the Act to
30 admit the recorded information as being in the public
31 interest, and also for the protection of the lawful
32 interests of Mr Denver.

33 In my view, the tape recording did not amount to an
34 interception of a communication passing over a
35 telecommunication and, therefore, it is not contrary to
36 the provisions of the Telecommunications Interception
37 Act 1979. Accordingly, I propose to permit that
38 evidence of the recorded conversation to be led.

1 EXHIBIT 63 MFI 63 tendered by Mr Smith.
2 Admitted.
3 EXHIBIT 64 MFI 64 tendered by Mr Smith.
4 Admitted.
5 EXHIBIT 68 MFI 68 tendered by Mr Smith.
6 Admitted.
7 MR TILMOUTH: Will you note my objection on the basis
8 of Section 35. I have argued that point before but I
9 would ask you to note my objection.
10 COMSR: Yes, of course.
11 CONTINUED

K.D. DENVER XN (MR SMITH)

1 WITNESS K.D. DENVER CONTINUING

2 EXAMINATION BY MR SMITH

3 Q. Looking at exhibit 68, on the transcripts there are some
4 blacked-out portions which actually are blacked out for
5 no purpose associated with this inquiry. The original
6 exhibit actually is clear. Although the marking out
7 with texta is on the original exhibit, it can be read
8 through. So I just ask, for the sake of everyone who is
9 trying to follow the transcript, could you please go to
10 p.2 of the original exhibit. There are two sections
11 with texta over them, aren't there.

12 A. Yes, to highlight it.

13 Q. Would you read them out into the record. Reading from
14 p.2.5.

15 A. 'Doreen's great grandmother and my great grandmother is
16 the same woman.' Further on 'Where my grandmother was
17 born.'

18 Q. That's after 'Point Pelican'.

19 A. Yes.

20 Q. Then the second phrase, just to repeat that.

21 A. 'Where my grandmother was born.'

22 Q. Moving to p.3, again texta has been used in that last
23 section of the page, has it not.

24 A. Yes.

25 Q. Would you please read, from the original exhibit, the
26 sections that are covered with texta.

27 A. 'Peter Rigney told Sarah to shut her mouth'. Then
28 'Sarah knows Connie has got the secrets of the island.'

29 Q. Or 'secret' singular, is it not.

30 A. 'Secret of the island'. And then 'Matt and the other
31 people, other black fella elders, got up and told Peter
32 to shut his mouth'.

33 Q. That's the only parts of the transcript which have had
34 texta applied to them.

35 A. They're the only parts that are hard to read on this,
36 yes.

37 Q. Just to clarify something that might or might not be
38 clear, p.1 and a third of p.2, is that part of the

K.D. DENVER XN (MR SMITH)

1 transcript which has been compiled from Evelyn McLaren's
2 shorthand notes. Is that correct.

3 A. Yes, that's correct.

4 Q. In that part of the transcript, we don't appear to have
5 you nominated as having any input into that conversation
6 as recorded there, is that correct.

7 A. About this time Doug was off in his own little world,
8 raving on, and if you see once the tape started, he did
9 rattle on for quite a while before I managed to get a
10 word in.

11 Q. So that, as the transcript shows, p.1 and a third of p.2
12 is all Doug Milera speaking.

13 A. Yes, all Doug speaking.

14 Q. I take it from that, that you must have had some things
15 to say at that stage, but they just haven't been
16 recorded.

17 A. It was hard enough to keep track of what he was saying
18 without having to worry about me, and it was mainly
19 `Yes', `No', I would manage.

20 Q. Then under the heading `Tape Recording Begins', to be
21 obvious, we start getting `DM' and `KD', being Doug
22 Milera and Kym Denver.

23 A. That's correct.

24 Q. At least on three occasions, is this the position, the
25 tape stopped because it ran out.

26 A. That's correct.

27 Q. Or two, I suppose. Three sides being -

28 A. We had the tape recording begin here where it says `Tape
29 Recording Begins'. The tape came to an end, it was
30 turned over, that came to an end, and a new tape found,
31 and that played part way through.

32 Q. The first change of tape is at p.7, is that correct.
33 Have a look.

34 A. I think it has got my handwriting in the column here
35 that indicates change of tape, if that's photocopied.

36 COMSR: Perhaps I could indicate there may be
37 passages of this transcript which will be suppressed. I
38 note that members of the press appear to have copies. I

K.D. DENVER XN (MR SMITH)

- 1 do not know at this stage, but there may be passages
2 suppressed. I simply point that out to the press
3 present.
4 XN
5 Q. So there was a change of tape two-thirds of the way down
6 p.7.
7 A. That's correct.
8 Q. Then a change of tape on p.12 at the bottom.
9 A. Yes. There is a few lines on each occasion where it is
10 not on tape, but we have put it back together with the
11 script while that happened. But all the rest you can
12 follow. Can I point out there is some choice language
13 in here at times, madam.
14 MR SMITH: We warn the press there may be some
15 suppression orders.
16 COMSR: I take it that all the persons who are
17 mentioned have been contacted?
18 MR SMITH: Yes.
19 TAPE PLAYED
20 CONTINUED

1 XN

2 Q. Can I take you to p.12 of the transcript, Exhibit 68.

3 There is some shorthand conversation there, isn't there.

4 A. At the change of the tape there's a little bit that goes
5 on. I was surprised that there's as much as there was.

6 As I said earlier, that's when we ran out of the tape
7 completely and we had to go and look for it.

8 Q. When we reviewed what was in the transcript, we omitted
9 to mention at the bottom of p.12 and over onto p.13

10 there's a portion of transcript there which you have
11 compiled from Evelyn McLaren's shorthand notes.

12 A. That's right. It doesn't really say anything much
13 relevant anyway.

14 MR MEYER: If it assists, my mark was it stopped
15 after the words 'Heritage Committee' nine lines from the
16 bottom on p.12.

17 XN

18 Q. Did you have any contact then after that evening of 28
19 June 1995 with Mr Milera.

20 A. No. The next occasion that I saw Doug, he was on the
21 television. I watched the television because I had a
22 phone call from the 7.30 Report to warn me that he had
23 been out the front of the Commission here handing out a
24 statement.

25 Q. That was the next time you saw him.

26 A. Well, I watched the television very keen that night to
27 see what was said.

28 Q. No other contact, no personal contact with him then
29 after 28 June.

30 A. The last time I saw him was in here the other day.

31 NO FURTHER QUESTIONS

1 MR SMITH: I indicate in respect of the transcript,
2 if there is any cross-examination, that in the light of
3 some of the things that are said that are a little
4 disparaging on the transcript of other people, we have
5 contacted - I don't want to go into it chapter and verse
6 and name people who have been contacted - all people
7 adversely affected who are not present have been
8 contacted this morning.

9 COMSR: I will see if there is any
10 cross-examination. I will then consider what I might do
11 in respect of the transcript.

12 MR TILMOUTH: I did have some cross-examination. I
13 wasn't prepared today. It's obvious as well, at least
14 to my way of thinking, that the reference in this
15 obviously relates back to a lot of other material which
16 we haven't heard yet which makes it difficult. I am
17 prepared to cross-examine today to some extent, but I
18 would prefer to reserve my rights to do so, depending on
19 later what comes out of anything. The difficulty with
20 this is that this obviously refers a lot back to that
21 earlier interview, and we haven't heard the contents of
22 that, the Channel 10 interview at the Appollon Motel.
23 What I say is that this doesn't make a lot of sense
24 without the contents of that, and we haven't had that.

25 MR ABBOTT: Why can't we play the tape?

26 MR SMITH: We can play the 7.30 Report tape -
27 sorry, the Channel 10.

28 MR TILMOUTH: That has other problems because of Miss
29 Layton's objection. And the other thing about that is
30 that if it's to be played anyway, one would want to hear
31 the whole series in relation to it. This doesn't make a
32 distinction apparently from what was on air and what was
33 off.

34 COMSR: You want to reserve your rights?

35 MR SMITH: As I understand, Mr Tilmouth can start
36 cross-examining and he should do so. This witness gave
37 evidence on 30 August, apart from this tape. Mr Denver
38 started his evidence on 30 August and perhaps Mr

- 1 Tilmouth is happy to go as far as he can.
- 2 COMSR: His evidence has been protracted. To
3 what extent is the party you represent implicated in
4 this?
- 5 MR TILMOUTH: That is the very point in question. On
6 one view, nobody. On another view, in very minor
7 respects, Victor Wilson would be one obvious one. There
8 is reference to him.
- 9 COMSR: On p.11 I can see one.
- 10 MR TILMOUTH: P.11 was my note. I think really p.9.
- 11 COMSR: Is there anything you can recall in the
12 television reports which implicate your client?
- 13 MR TILMOUTH: Well, to be honest, I haven't seen those
14 reports. The only interview I saw myself was the
15 interview of Mr Milera, I think the same evening that he
16 presented the statement outside the Commission. That is
17 all I've seen or heard.
- 18 COMSR: Is there anything in particular arising
19 out of the passage as far as Victor Wilson is concerned
20 that you wish to cross-examine on now?
- 21 MR TILMOUTH: As I understand it, if we deal with p.9,
22 that's about three-quarters of the way down, where it
23 says `DM: I went with Victor to North Adelaide' and then
24 it goes on about Westpac. Now, I didn't hear that
25 precisely. I'm not sure whether it said `Victor' or
26 `Vic', or something. As I understand the effect of it,
27 he went on anyway to say that he went with Victor to see
28 Matt Rigney and not Westpac.
- 29 COMSR: Yes: `Me, myself and Victor Wilson'.
- 30 MR TILMOUTH: Perhaps Mr Smith might be able to
31 clarify that. I didn't take it to be an allegation that
32 Victor Wilson went with him to Westpac.
- 33 COMSR: I don't suppose this witness can clarify
34 what Doug Milera said.
- 35 MR TILMOUTH: I did not hear the word `Victor' or
36 where it appears he went to North Adelaide.
- 37 COMSR: Perhaps you can be given an opportunity
38 to listen to the tape.

- 1 MR TILMOUTH: The other thing I would like to add is
2 that it's not obvious, in my submission at least on the
3 face of this, having heard it, that there is any overt
4 consent to it being recorded by Mr Milera. I would
5 submit quite to the contrary as a matter of fact.
- 6 COMSR: There was no claim that there was overt
7 consent on the tape.
- 8 MR TILMOUTH: It would appear that it was, on the face
9 of it anyway, meant to be private. `I trust you as
10 between us'. The passages I had in mind were p.6 `Just
11 you and I' and at .3 `You can tell Chris Kenny
12 afterwards'. There's the criptic reference at the 4th
13 line from the bottom of p.6 `Have you got all that? A.
14 Yeah, Yeah'. That, to an extent, maybe counts
15 otherwise. P.7, that last quarter, `Talking to a
16 friend', which implies a degree of confidence.
- 17 MR SMITH: Excuse me Mam, we have had the argument
18 about the admissibility of the tape recording.
- 19 MR TILMOUTH: I understand that, but -
- 20 MR SMITH: You have ruled on that and you have
21 ruled on it on the basis that it's consent - and even if
22 it wasn't consent, that you would exercise your
23 discretion. Do we have to go into this all again?
- 24 COMSR: I don't know for what purpose Mr
25 Tilmouth is raising this. It was on the basis of Mr
26 McLaren's evidence that it was -
- 27 MR TILMOUTH: Perhaps I understood that one of the
28 factors argued to you was that there was internal
29 evidence of this recording that it was supposed to be
30 with his express consent. With respect, if that was a
31 factor, that is very hard to find, at least on my
32 hearing of it, in the document.
- 33 COMSR: Where does that leave me with respect to
34 your wish to cross-examine?
- 35 MR TILMOUTH: As I said, the prime difficulty on this
36 matter is that there is not much that I could reasonably
37 cross-examine on. The difficulty I have is that it
38 plainly relates back to the earlier interview which we

1 haven't heard about. At this stage, I'd prefer to
2 reserve my rights and that any cross-examination would
3 be perfectly perfunctory and decidedly incomplete.

4 MR ABBOTT: I wouldn't have thought that Mr Tilmouth
5 wouldn't have anything to cross-examine on. The law in
6 relation to tape recordings has grown in the last few
7 years - and I don't have the authority with me, but I
8 can bring it. It's not appropriate to ask this witness
9 as to what he hears on tapes, whether what was said on
10 the tape is true. The tape is the piece of primary
11 evidence. From what I recall, it is never to be what
12 this witness says is on the tape, it is going to be what
13 you say is on the tape. I would have thought that the
14 way to resolve it is for counsel assisting now to
15 prepare a revived transcript, to circulate it, if need
16 be, to Mr Tilmouth and to me and invite our comments and
17 additions thereto. So that eventually there is a
18 transcript which is either accepted by all parties as
19 being what you could hear on the tape, or the subject of
20 any agreement that is probably highly likely in the
21 course of this Commission, at least something that you
22 tell us is what you hear on the tape. At the end, it is
23 what you hear on the tape that is the evidence and only
24 the evidence.

25 COMSR: I think that is so. This witness cannot
26 throw any light on what Doug Milera may or may not have
27 meant by his comments. There are, of course, some
28 gratuitous remarks about people peppered through this
29 record of interview, but there is one passage that
30 perhaps I should suppress on p.12, and that is the
31 references which before had been considered to be
32 offensive to 'nigger in the wood pile'. I don't think
33 we need to have that comment published. It's difficult
34 to see that it's really all that relevant to the issues
35 that are before this inquiry. So that I would propose
36 to suppress from publication that remark.

37 I don't know if there are any other passages that
38 anyone wishes to suggest that should be, in the

- 1 circumstances, suppressed?
- 2 MR ABBOTT: It's my understanding that Mr Iles
3 didn't ring up Mr Milera. If anyone wants to publish
4 anything about what is said about Mr Iles, who is not
5 here today, but my understanding is that Mr Iles didn't
6 ring him. I hate to spoil a good story.
- 7 COMSR: Which passage of evidence is that?
- 8 MR ABBOTT: That is on p.14.
- 9 MR MEYER: P.12.
- 10 MR ABBOTT: That is a report that Mr Denver was
11 suggesting to Mr Milera that Mr Iles would be a good
12 lawyer for him to have. But I would like to make it
13 clear that my understanding is that Mr Iles didn't ring
14 him up.
- 15 COMSR: There was a suggestion that he might.
- 16 MR ABBOTT: These things are misreported in the way
17 that more is put into them than should be.
- 18 MR MEYER: There are two items that occur to me,
19 none of which have the slightest thing to do with me.
20 Doesn't stop me from getting up and speaking about it
21 though.
- 22 COMSR: It hasn't stopped other people.
- 23 MR MEYER: Clearly doesn't stop me. At the bottom
24 of p.8, there is a reference to a person or lawyer from
25 Adelaide. Some people may be able to identify that
26 person and I don't think what is said there in terms of
27 publication is in any way relevant to assist anybody.
- 28 COMSR: I don't think so either.
- 29 MR MEYER: That is merely the last dozen or so
30 lines on p.8.
- 31 COMSR: Those are gratuitous remarks.
- 32 MR TILMOUTH: I agree with that, and that is very fair
33 of you to raise it.
- 34 COMSR: Again, we are talking about the passage
35 of evidence on p.8 concerning -
- 36 MR MEYER: `I've got a personal lawyer from
37 Adelaide'. From there on, I think is irrelevant.
- 38 COMSR: `I have got a personal lawyer from

- 1 Adelaide' up to and including the remark `Oh well, you
2 can't trust him', that passage of evidence is suppressed
3 from publication.
- 4 MR MEYER: The second one that occurred to me was
5 that much as it might attract members of the press to
6 publish something about other members of the press, it
7 could be described in the fashion that - that's referred
8 to in the place that I can't find. That is on p.8,
9 midway down p.8. Those comments, if they were made
10 about a member of the press rather than to name him,
11 that might be fairer.
- 12 MR SMITH: That particular gentleman has been
13 notified.
- 14 MR MEYER: Then I'm sure that he is more than
15 capable of looking after himself.
- 16 COMSR: Yes, but it might seem like a gratuitous
17 insult for him.
- 18 MR MEYER: My point is I don't think that those
19 suppressions make a difference to the overall concept.
- 20 COMSR: I don't think so either and I can't see
21 that gratuitous insults should be published.
- 22 MR SMITH: I spoke with Andrew Short, that
23 journalist's lawyer, who specifically told me he is
24 instructed not to seek a suppression of that.
- 25 MR MEYER: I withdraw my suggestion.
- 26 MR SMITH: Is there no cross-examination of Mr
27 Denver?
- 28 MR LOVELL: I would be seeking to cross-examine Mr
29 Denver. As I understood the order of things, I would be
30 after Mr Tilmouth. I don't want to start and then there
31 be Mr Tilmouth and have two bites of the cherry. That
32 is for Christopher Kenny, the journalist involved.
- 33 COMSR: Is there anything concerning the
34 evidence relating to Mr Kenny that I should at least
35 make a temporary order about?
- 36 MR LOVELL: No, nothing there.
- 37 COMSR: I'm wondering if there are any other
38 aspects of the evidence about which - p.4 of the

- 1 evidence are the comments concerning ATSIC, as I
2 understand it. I don't know if ATSIC has been notified
3 at all?
- 4 MR SMITH: This is a large institution we are
5 talking about here. The entire conversation is critical
6 of a wide range of processes. I think that certainly
7 gratuitously insulting remarks behind people's backs who
8 are not represented here are one thing, but that sort of
9 matter, I would submit, doesn't require suppression.
- 10 MR MEYER: I support that.
- 11 COMSR: Have you comments about Mr Wooley on
12 p.9.
- 13 MR SMITH: It's really not a reflection on Mr
14 Wooley, any of that.
- 15 COMSR: It is not a question of Mr Wooley.
16 While I'm dealing with it, is there anyone else?
- 17 MR SMITH: I think as to p.8, could you be clear
18 about that, Mam, for the sake of the media. You're
19 suppressing, I take it, the Milera comment of `I've got
20 a personal lawyer from Adelaide', right down to `Oh
21 well, you can't trust him'?
- 22 COMSR: Both comments inclusive.
- 23 MR SMITH: That is five lines on p.8.
- 24 CONTINUED

K.D. BOURNE XN

1 MR BOURNE: Might I be heard on that last aspect?

2 COMSR: Yes. Are you appearing or not
3 appearing?

4 MR BOURNE: I am one of those advised this morning
5 by counsel assisting of the text, at least in part, of
6 the transcript. I may be the personal lawyer spoken of
7 in that particular part of the transcript.

8 COMSR: Which page are you referring to?

9 MR BOURNE: I have not seen the transcript before.
10 I am looking at it now for the first time. I believe it
11 is at the bottom of p.8, the passage which you just
12 suppressed. I am indebted to Mr Meyer for drawing the
13 commission's attention to it. As I say, I have only
14 seen the transcript for the first time now.

15 I would be happy to consider my position once I have
16 seen the revised transcript, or at least had the
17 opportunity of considering this copy of it. It may well
18 be that I have no objection, and nor does my client, to
19 that passage not being suppressed, but I think the
20 appropriate course is for it to be suppressed at the
21 moment and I will consider my position.

22 COMSR: That is what I am doing, suppressing
23 these matters, and then people can consider their
24 positions. In any event, I think a gratuitously
25 insulting remark which has got nothing to do with the
26 purposes of this commission is something that should be
27 suppressed.

28 MR SMITH: The means by which Mr Bourne gets the
29 transcript - there is no need for him to have a copy of
30 the transcript. The only mention of him, if it is him,
31 is suppressed. What else does he need?

32 MR BOURNE: If an order is being made, and being
33 made of my position, and my position in relation to Mr
34 Milera, then it is appropriate that I have the
35 opportunity of being heard on that.

36 COMSR: Yes, if you come before me on an
37 application to be heard, but for the time being what I
38 am simply trying to do is to preserve people's positions.

- 1 MR BOURNE: That is all I am seeking to do as well.
- 2 COMSR: The only other thing is whether I should
- 3 impose any suppression orders myself consistent with my
- 4 prior practice in relation to these matters. Are you
- 5 suggesting I -
- 6 MR SMITH: No, I am not suggesting any more
- 7 suppressions.
- 8 COMSR: And nobody else is. Is this the
- 9 situation, that you are not ready to cross-examine at
- 10 this stage?
- 11 MR LOVELL: No, I could. I do not have very many
- 12 questions, but I thought I was going to follow Mr
- 13 Tilmouth.
- 14 COMSR: Mr Tilmouth has indicated that he wishes
- 15 to preserve his position for the time being and he may
- 16 not, in any event, be wishing to cross-examine. Under
- 17 those circumstances, is there anyone else ahead of you
- 18 wishing to cross-examine on any aspect of this evidence?
- 19 MR LOVELL: So long as, if Mr Tilmouth raises any
- 20 topics that need further cross-examination - that is my
- 21 only concern.
- 22 COMSR: Where are the passages of evidence with
- 23 which you are concerned?
- 24 MR LOVELL: Really nothing in this transcript.
- 25 There is some matters that Mr Denver mentioned a long
- 26 time ago on 30 August when he gave some more general
- 27 evidence.
- 28 COMSR: Mr Denver has had his evidence
- 29 protracted to a very great extent, which was one of the
- 30 reasons why I considered that we should proceed and
- 31 finish his evidence, if it is at all possible.
- 32 MR LOVELL: I am happy to proceed.

1692

RF 23H

K.D. DENVEN XXN (MR LOVELL)

1 CROSS-EXAMINATION BY MR LOVELL

2 Q. Right back when you first gave some evidence in this
3 matter, you talked about the number of times you had met
4 Doug Milera. You remember that.

5 A. I am having a bit of trouble hearing.

6 Q. I want to take you back to the time you had some contact
7 with Mr Doug Milera prior to him making phone contact.

8 A. Yes.

9 Q. Do you remember giving that evidence.

10 A. Yes, yes.

11 Q. I think you had met him at a picnic, is that right.

12 A. No. That was referred to - the picnic thing was
13 referred to in a telephone conversation.

14 Q. Perhaps I can short-circuit it. I think you gave three
15 specific instances of when you'd actually met Mr Milera
16 face to face. Had you actually heard him speaking at
17 other rallies and things like that, but not actually
18 spoken to him.

19 A. Yes, I'd been monitoring this whole bridge saga for
20 years, it seems, and watched anything that came along.
21 So that when the Mileras entered the scene, I watched
22 them with as much passion as anything else.

23 Q. From time to time, did you hear Mr Milera speak at these
24 sorts of rallies.

25 A. Yes. I think over the years I've seen every bit of film
26 footage that has ever been made about this saga.

27 Q. It is not just film footage. Did you hear him speak at
28 a rally live.

29 A. I don't know that I actually saw him addressing a rally.
30 I've spoken to him at one of my rallies, but I've -

31 Q. In the context of the conversations that you have had
32 with him, how long have they been. Has it been a
33 minute sort of conversation, or have you engaged him in
34 five or ten minutes conversation.

35 A. The day we were in the old police station at Goolwa,
36 when Professor Cheryl Saunders was having her inquiry,
37 whatever it was, I spoke to him for probably 2 or 3
38 minutes. We referred to that the other day. He was

K.D. DENVEN XXN (MR LOVELL)

1 complimenting us on what we had done with regard to what
2 could be possibly called an Aboriginal site, was pleased
3 with what we were doing on our farm, and he was pleased
4 with the way I was conducting the whole thing and it
5 wasn't just a racist slanging match. He was pleased
6 with the way we were doing things, and he said he also
7 had respect for my father, who had come out against him
8 at a rally on another occasion.

9 Q. Any other conversations that you had had with him.

10 A. The only other conversation that I had had with him was
11 outside the post office on the day of the rally which
12 was addressed at the wharf. That was very briefly. I
13 was in front of the rally as MC type of thing, and I was
14 just looking for a breather. Doug was on the steps, and
15 I just walked over and said 'Goodday, Doug. Do you want
16 to come over and join our rally?' And he laughed and
17 said he didn't think he should.

18 Q. On the day that he contacted you on 5 June, that's when
19 you went to the tavern, you were with him for some time
20 prior to the recorded interview with Mr Kenny.

21 A. Hours.

22 Q. You sat through the interview with Mr Kenny, didn't you.

23 A. Yes. I was with him, as I said the other day, all bar
24 when I took that letter that was constructed for him,
25 out to the girl to type up, and I was back in there I
26 think while she was typing it up, after we corrected the
27 spelling of 'Armitage' and 'Binalong', 'Kumarangk' or
28 whatever.

29 Q. During the time that he was being interviewed by Mr
30 Christopher Kenny, did he appear to be in the same sort
31 of state as he had been when you had first seen him
32 earlier on in the day.

33 A. He went up and down and bit. He was very agitated when
34 I first picked him up in the motor vehicle. He cooled
35 off a little bit and was calmer while we were waiting
36 for Chapman. He was a little bit more aggravated,
37 agitated, when we were on our way to meet Channel 10.
38 When we got there he seemed particularly agitated. He

1 was a bit worried by the cameras and stuff, and after a
2 short period of time he was agitated that they were
3 taking so long to get him on camera. So he went up and
4 down a little bit, but most of the time he was fine.

5 Q. Is it fair to say that during the course of the
6 interview that was done on camera, he was behaving, in a
7 general sense, the same as what he was when you had
8 first seen him earlier in the day.

9 A. Not much different. When we first arrived at the motel
10 he seemed a little bit anxious. When we sat down with
11 Chris Kenny - and I think I've made mention of this last
12 time they allowed me in here - I thought that Chris
13 Kenny seemed a nice bloke, he sat for a long time taking
14 notes and things before he even put him on camera, in
15 which time Doug settled down completely. He was fine.

16 Q. In that period of time, from when Chris Kenny turned up
17 at the motel and the cameras eventually began to roll,
18 did Mr Kenny put any pressure on Mr Milera to
19 participate in a video interview.

20 A. No, no. He didn't put any pressure on him at all. That
21 was what I indicated yesterday. He didn't seem sleezy
22 enough to be from the press.

23 COMSR

24 Q. I can see you are trying to win friends among members of
25 the press.

26 XXN

27 Q. We have just heard that tape played and Mr Milera
28 speaking to you by telephone. Is that the way he
29 appeared to you on that day, 5 June. I know it is only
30 a telephone conversation, but talking like that and
31 sometimes a little bit difficult to understand.

32 A. Doug is always like that. If you look at any channel's
33 film footage, he is up and down like that. He is
34 difficult to understand even if there is only two of you
35 in the room. So from listening to a tape or seeing film
36 footage - that's why I think it is very difficult for
37 the press to judge whether the guy is drunk or not from
38 film footage. He's very hard to judge.

K.D. DENVEN XXN (MR LOVELL)

1 Q. When you were speaking to Mr Milera on the day, this is
2 28 June I think, the day of our tape, did you form the
3 opinion that when you were speaking to him he was drunk.

4 A. No, no. He had indicated, before it came on, the tape,
5 that he had spent all day packing the house up, shifting
6 out, that he had nothing. And when he is on tape he
7 says that he is dry, he needed a drink, he's been
8 working all day. So, as far as I was concerned, that
9 day he had nothing whatsoever to drink, and everything
10 he said is backed up with what happened on that night on
11 Channel 10.

12 Q. After the interview had finished, this is jumping back
13 to 5 June again, you say that Mr Kenny told you that he
14 hadn't wanted to give Mr Milera any money, but he just
15 didn't want to see him sleep in the gutter.

16 A. That was when the two of us were alone in the car on the
17 way from the Grosvenor to the Appollon. He said that he
18 hadn't wanted to give him anything. He just didn't want
19 the guy to be in the gutter that night, virtually. He
20 mentioned that several times to Doug Milera, that he
21 wasn't going to do the story at all if money was the
22 only reason.

23 Q. That assisted in your opinion of Mr Kenny, that he was a
24 journalist with a heart, as opposed to your respect for
25 the press generally.

26 A. I don't have to defend Mr Kenny. Mr Milera has done
27 that himself on the tape. It is beyond a doubt he's
28 done the right thing. This is three weeks later and
29 he's still saying he has done the right thing.

30 NO FURTHER QUESTIONS

31 MR SMITH: Could we ask Mr Tilmouth to identify the
32 area on which he may be cross-examining this witness?

33 MR TILMOUTH: The interview of 5 June, but we don't
34 know content so I don't know whether it touches on it or
35 not.

36 COMSR: Is this the situation, that I can
37 release the witness and that, if necessary, recall him
38 at a later date?

K.D. DENVEN XXN (MR LOVELL)

1 MR TILMOUTH: If that's convenient. It may be 5 June
2 doesn't touch me significantly.

3 COMSR: You are released, subject to this, that
4 you may be recalled at a later date if Mr Tilmouth
5 identifies some area on which he may wish to
6 cross-examine you.

7 WITNESS: Am I allowed to speak to the press when
8 I go out today, so long as I don't touch anything
9 suppressed?

10 COMSR: That is a matter for you. Not for me to
11 comment.

12 WITNESS: All right. I just didn't want to do the
13 wrong thing by the court.

14 WITNESS RELEASED

15 MR SMITH: That is the evidence for today. I can
16 put counsel on notice that the witnesses for tomorrow
17 are Mr Malcolm Robert Bates, the publican from the
18 Middleton Tavern; Miss Kyla Mulhern from the Appollon
19 Motor Inn; and Mrs Sue Lawrie.

20 ADJOURNED 3.54 P.M. TO TUESDAY, 5 SEPTEMBER 1995 AT 10 A.M.

