A tale of two cultures

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Hindmarsh Island Bridge: protection requires the disclosure of secrets.

In 1989, the proposal to build a bridge joining the island known variously as Hindmarsh or Kumarangk to the mainland created some interest and concern around the island and the town of Goolwa. Who could have predicted that, six years on, the proposal would become the focus of a national debate about regimes for ascertaining, valuing and protecting Aboriginal cultural heritage? Both politically and legally, the *Hindmarsh Island Bridge* case stands as an example of the inability of the Anglo-Australian system to comprehend Aboriginal cultural interests. It also provides clear evidence that the dominant political and legal system has yet to find a language and means of according any significant recognition to indigenous systems of law, regulation and belief which does not operate to appropriate those systems of law, regulation and belief.

This article considers some of the significant issues that the case raises. It is not intended to be an exhaustive analysis of them.

Stories of dominance and colonisation

A dominant narrative emerges from the case — that of the dominant system, of legislative regimes involving determinations about what constitutes Aboriginal sites and the extent of their significance, ministerial discretion, the rules of natural justice and requirements that 'the heritage' be tested according to the rules of the dominant system in order to establish its 'truth'. This narrative operates to construct and define Aboriginal cultural heritage according to its dominant world view, using that view to give it meaning or to disclaim and reject it. A second narrative is that of indigenous people claiming protection for their cultural heritage under these regimes, trying to characterise their system of beliefs in a manner that can be heard and understood within the dominant system notwithstanding its transformation as a result of colonisation and dispossession. These two divergent and irreconcilable narratives provide the basis for both exploring the case and attempting to understand it.

The dominant story can be told 'factually'. In 1989 a small private company with the fetching name of Binalong Pty Ltd, controlled by Thomas and Wendy Chapman, began planning for a major development on Hindmarsh Island which lies at the mouth of the Murray River in South Australia. The development consisted of a marina complex consisting of 320 marina berths, and residential, business and service facilities which would dramatically increase the scale of activity on the island, creating jobs in its construction phase and transforming the small, sleepy island into a high activity boating holiday paradise. The only car access from the mainland to this island paradise was via a single cable-drawn ferry. So an essential element of the development, and a condition of some approvals for the marina, was the building of a bridge from the mainland to the island. The project was supported by the State Labor Government and the bridge was to be constructed

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by the Government with a contribution from Binalong Pty Ltd, and subject to a satisfactory environmental impact statement.

Binalong Pty Ltd indicated a concern about Aboriginal interests affected by the project by 'seeking the services of an anthropological authority, Mr Rod Lucas' who had difficulty in establishing *reliable* genealogies and apparently could not reconcile Taplin's mission genealogies from the 1860s with those of Berndt and Tindale collected almost 100 years later.[1] The Department of Environment and Planning (with some involvement from Binalong Pty Ltd) also commissioned an archaeological report from Dr Vanessa Edmonds for the purpose of locating, recording and assessing Aboriginal sites on Hindmarsh Island. Following these reports the project was given the go ahead.

The marina project proceeded, with the first phase completed by 1993. Approval for the following phases of the marina was subject to the commencement of work on the bridge.

There was some opposition from local residents who were not keen to change the character and amenity of their environment. This opposition in the form of demonstrations resulted in work on the bridge ceasing in October 1993. Indeed the State Liberal Opposition did not support the project and indicated before the December 1993 State Election that it would stop the construction of the bridge.

In early 1994 the newly elected Liberal Government commissioned and received advice from Samuel Jacobs, QC about its obligation to proceed with the bridge. The advice was to the effect that the Government was bound by the agreements made by the previous Government in relation to the construction of the bridge. Failure to proceed would result in a compensation claim of $20 million. A further report was then prepared by Dr Neale Draper. Even though this report confirmed the existence of Aboriginal sites on both sides close to the proposed bridge, these provided insufficient grounds for the Government to halt the bridge project. Some of the subsequent events were described by Justice O'Loughlin:[2]

> . . . the matter was beginning to gain momentum. The Federal Court had injuncted protesters, restraining them from interfering with the bridge works; the South Australian Minister had made a Ministerial statement in the House on 3 May 1994 advising that he had that day issued an authorisation allowing damage to Aboriginal sites to the minimal extent necessary to allow the construction of the bridge; work had recommenced on the site and protesters had been arrested on 11 May.

Late in 1993 the Lower Murray Aboriginal Heritage Committee and the Aboriginal Legal Rights Movement expressed concern about the impact of the proposed bridge on Aboriginal sites in the area in correspondence to the Federal Minister for Aboriginal Affairs. Further correspondence with the Federal Minister did not occur until April 1994, after the South Australian Government finally indicated its view that the bridge construction should proceed. That correspondence sought an emergency declaration under s.9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the *Heritage Act*). The Minister is empowered to make a declaration for the protection of areas provided she or he is satisfied that the area is a significant Aboriginal area and is threatened with injury or desecration. Such a declaration can only be made after receiving and considering a report and any representations attached to it and any other relevant matters.[3] The Minister made the emergency declaration (for 30 days) on 12 May 1994 and extended the declaration for a further 30 days on 9 June 1994. During the period of the emergency declaration, Professor Cheryl Saunders prepared a report for the Minister pursuant to s.10(4) of the *Heritage Act*. On 9 July 1994, the Minister made a declaration for 25 years prohibiting a range of acts in the area including acts done for the purpose of constructing a bridge in any part of the area.

It was not until the correspondence of April 1994 and Professor Saunders' report that the issue of secret and special knowledge of, and interests in, the area by women (referred to in almost all the relevant materials as 'women's business') was raised publicly and, it seems, formed the basis of the Minister's decision.

The Chapmans sought to review the Minister's decision and Professor Saunders' report in the Federal Court. Justice O'Loughlin ultimately found for the Chapmans on two main grounds as detailed below.

The Minister unsuccessfully appealed this decision to the Full Federal Court which confirmed the reasoning of O'Loughlin J.[4]

But there's more to this story, as considerable activity occurred between the two Federal Court decisions. On 16 June 1995 the South Australian Government established a Royal Commission to enquire:

> [w]hether the 'women's business', or any aspect of the 'women's business' was a fabrication and if so:
>
> (a) the circumstances relating to such a fabrication;
>
> (b) the extent of such fabrication; and
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> (c) the purpose of such fabrication.[5]

The justification for the Royal Commission claimed by the Government was some 'allegations that the secret "women's business" is a fabrication' and that '[t]here was significant disagreement within the South Australian [A]boriginal communities regarding the "women's business" and the allegations'.[6] The immediate event leading to the establishment of the Royal Commission was the appearance on television on 5 June 1995 of Doug Milera who said, 'I think the whole issue of the women's belief was fabricated'[7] and claimed to have played a part in the fabrication. The television appearance was the culmination of political and media discussion about the possibility of 'fabrication' that first emerged in late 1994 and relied on the views of a number of Ngarrindjeri women that they did not know anything about the 'women's business'.

On the day the Royal Commission was announced, the Commonwealth Minister for Aboriginal Affairs announced that a new inquiry under the *Heritage Act* would be conducted by Justice Jane Mathews once the Full Court of the Federal Court handed down its decision. This inquiry began in January 1996. The Minister also announced a review of the Act to be conducted by Elizabeth Evatt.

The Royal Commission conducted its hearing in the latter part of 1995. Ngarrindjeri people supporting the application to the Commonwealth Minister did not give evidence. The Commission reported on 19 December 1995. It found that:

> the whole of the 'women's business' was a fabrication [in order] to prevent the construction of a bridge between Goolwa and Hindmarsh Island.[8]

The second narrative in this case centrally challenges the dominant system. The chronological description of events may not vary markedly, but the process, meaning and significance of those events may. As with the chronology set out

above, aspects of this narrative rely on publicly available material.

Groups of indigenous people occupied Hindmarsh Island and the Lower Murray area prior to the arrival of European sealers in the region in the early 1800s. The area now known as South Australia was physically colonised in 1836, although, according to the dominant legal system it was claimed by the British upon the acquisition of sovereignty over New South Wales in 1788. As a result, the legal fiction that the Crown acquired radical and beneficial title to all lands in the colony of New South Wales, based on the notion of *terra nullius*, applied to the Lower Murray region and provided the basis for the systematic dispossession of the original inhabitants of that land.

The Royal Commission referred to some aspects of this physical dispossession. Prior to 1836, sealers 'forcibly abducted Aboriginal women from the coastal regions to become wives and labourers'. During this time there were two waves of smallpox which 'had an enormous impact . . . upon the population'. Venereal disease, introduced by the European population, also had a severe impact on the indigenous population. By 1840 Hindmarsh Island had been leased to Europeans and the impact of this advancing European frontier and disease resulted in the decline of the indigenous population. Some Ngarrindjeri remained on Hindmarsh until early this century when they were removed to the Port McLeay Mission at the eastern end of Lake Alexandrina. Port McLeay Mission was established in 1859 by George Taplin. 'Taplin's main intention was . . . to [c]hristianise the Aboriginal people and he therefore saw little place for indigenous behaviour and beliefs in the future development of the people.' Indigenous people were forcibly moved to the mission and although some remained on the Island, '. . . by 1910 the remaining few were moved to Point McLeay'.[9]

The operation of the *Aborigines Act 1911* (SA) gave the chief protector of Aborigines extensive powers to restrict or force the movement of indigenous people at the mission resulting in an absence from their traditional lands, break-up of families and transformations in traditional practices and traditional knowledge. As a result of changes in the *Aborigines Act* in the 1940s some indigenous people were able to leave the mission resulting in a further dispersal of the Ngarrindjeri people, a trend accelerated with the abolition of these restrictive laws in the 1960s. While many Ngarrindjeri people still live at Point McLeay Mission, now known as Raukkan, many also live elsewhere. The forced movement and subsequent dispersal of Ngarrindjeri people will have had an effect on knowledge retained and passed on. This might also impact on who receives the knowledge and in what form. All these factors have a transformative impact not only on the knowledge itself but also its transmission.

One major point emerging from this narrative is the power exercised by the dominant system over the lives of the Ngarrindjeri. All aspects of their lives became regulated by the mission and the protector with the backing of the legal system. Conversely the Ngarrindjeri had little power to assert themselves in the face of enforced removal from their land, subsequent dispersal and cultural destruction wrought by decisions backed by the power and force of the dominant legal system. When five barrages were constructed joining Hindmarsh Island to various other pieces of land including the mainland between 1935 and 1940 and the approaches for the ferry service in the 1950s, there was no discussion or consultation with Ngarrindjeri. If there was opposition to these developments around the island, it could not find a voice within the dominant system much less take steps to prevent the development. There simply was no means of doing so.

When the first proposals for the Hindmarsh development were made there was some consultation with Aboriginal people both by the developers Binalong Pty Ltd and the Government through the Aboriginal Heritage branch of the Department of Environment and Planning. These and subsequent consultations concentrated largely, although not exclusively, on archaeological material. Ensuing events suggest these consultations might not have been adequate. Certainly as time went on different views were expressed by Aboriginal people about whether the proposal should proceed, the significance of the area and the basis on which the bridge might or should be opposed. Although the consultations produced some opposition to the construction of the bridge, they did not reveal the 'women's business'. It was not until Professor Saunders conducted her consultations that the women were involved. However, the Ngarrindjeri sought to use the only means currently available to them to prevent construction of the bridge, that being the dominant legal system's heritage protection legislation. When the State legislation failed to provide any protection — the State Minister authorising the destruction of Aboriginal sites necessary for the construction of the bridge — the Ngarrindjeri sought protection under the *Heritage Act*. The failure, to date, of that legislation to provide protection of Ngarrindjeri interests confirms the main thrust of this narrative: the subordination of Aboriginal interests to those of the dominant system and the inability of the dominant legal system to adequately understand and protect those interests because it intersects with them only within its dominant paradigm.

Some major events

It is not possible to explore all the major events in this long-running case. However, a number of significant events emerge from these narratives and require further examination. Some are legal and some go beyond the strictly legal but take on significance because of their relationship with the operation of the dominant legal system.

The Federal Court decisions

A number of parties brought actions in the Federal Court challenging the validity of the Minister's (and later Professor Saunders') decision-making processes. The major parties were the Chapmans and the Minister. Although there were many grounds for the challenge, the Court ultimately found only two problems with the process resulting in the Minister's 25-year protection declaration: the notice advising of Professor Saunders' inquiry was inadequate, and the Minister had not *considered* the women's restricted representations attached to her report as required by s.10(1)(d). Professor Saunders had attached these representations in a sealed envelope, with the rider that they be read by women only.

The notice of the inquiry was said to lack specificity. It did not identify with detail the area of the inquiry, even though this was known to the Minister. In any event the notice was also found deficient because it did not detail 'the perceived desecration . . . that the bridge would have upon the spiritual and cultural beliefs of Aboriginal women . . .' Of course, at this point, Professor Saunders had no detailed knowledge of these matters. The justification for O'Loughlin J's view was that '. . . [a]n ordinary member of the public should have been able to read the notice in the local press and

thereby determine from the information that it contained whether the matter was one of interest to him or her'.[10]

The second major problem was that the Minister did not *consider* the representations attached to Professor Saunders' report but relied on the advice of a female staff member to inform him of the contents of these representations and, in particular, to advise him that the material in the sealed envelope supported the findings of Professor Saunders. The Court did not find that the Minister must read every word of every document; but there must be 'substantial personal involvement'[11] by the Minister. This was especially so in relation to the material in the envelope because of the emphasis he placed on the 'women's business' in making his decision. To some extent the finding of O'Loughlin J on this point might be confined to its facts as he found, on the basis of both written and oral material before him,[12] that the staff member's advice was inadequate to allow the Minister to *consider* the attachments. A fuller briefing of the Minister may have satisfied O'Loughlin J's requirement for substantial personal involvement, although, by implication, such a briefing should involve sufficient detail (and substance) of the beliefs to support the declaration. This in itself could amount to a revelation of what should be secret.

The Minister's failure to *consider* the representations could have been remedied by the Minister reconsidering the representations. The inadequacy of the notice meant that the applicants were denied natural justice and that the Minister lacked jurisdiction to make the declaration.[13]

The Minister appealed this decision unsuccessfully to the Full Court of the Federal Court. For the purpose of this article it is sufficient to say that, in three separate judgments, the Full Court upheld the reasoning of O'Loughlin J.

In relation to both these issues —namely, the adequacy of the notice and the Minister's *consideration* of the representations — there is an emphasis on revealing information or knowledge in order that it might be scrutinised, evaluated, weighed against competing interests and decided on. The framework within which this occurs is the dominant legal system and an examination of decisions suggests that the dominant system can find no alternative means of assessing such claims.

A fundamental assumption underlying this approach is that Aboriginal heritage claims based on relationships to land are capable of transparent evaluation and assessment by the dominant legal system. Such an assumption might be based on one of two notions: either that the difference in these relationships is not so great as to prevent adequate consideration by the dominant legal system or, to the extent that they are different, they should be subjugated to the analysis and practices of the dominant system.

This conclusion can be drawn from the finding that details of the 'women's business' should have been advertised. While O'Loughlin J did suggest that there may be difficulty in providing detail where the information was secret,[14] his Honour was in no doubt that enough detail was necessary so that the general public could know the nature of the significance of an area and the nature of the threat to it.[15] Similarly, his Honour was in no doubt that in this case the Minister should have been made aware of the detail of the 'women's business' in the envelope. O'Loughlin J indicated that while Aboriginal claims to confidentiality can be maintained, a time will necessarily come when there must be some disclosure so that a claim can be tested. Black CJ, on appeal, suggested that Aboriginal groups when making claims need to understand that there is an 'obligation to consider all representations [as] part of the process'.[16]

By inference then it appears that if Aboriginal people seek to claim protection of their cultural heritage under heritage legislation, they impliedly accept the 'rules' of such protection demanded by the dominant system. If this is not accepted, then the protection provided by the system cannot be claimed. Where places of significance are based on beliefs, an integral part of which is secrecy or which is gender specific secrecy, this requirement for disclosure may itself have the effect of diminishing or destroying aspects of the heritage that is sought to be protected. The strict application of the rules and procedures of the dominant system, therefore, may operate to prevent protection of heritage even where legislation is specifically expressed to be for the purpose of such protection as is s.4 of the *Heritage Act.*

The Royal Commission

The Royal Commission[17] was required to consider and report on issues relating to the alleged 'fabrication' of the 'women's business' which formed part of the basis for the Federal Minister's declaration preventing construction of the bridge. The Commission interpreted 'fabrication' as involving 'the deliberate manufacture of secret "women's business" where it did not previously exist'.[18] The Commission conducted its inquiry 'along the lines of a trial'[19] with witnesses giving evidence and legal representatives permitted to question them. The standard of proof applied by the Commission 'was proof on the preponderance of probability with due regard to the importance of the particular issue being determined'.[20] These issues were identified as 'important economic consequences follow[ing] the decision to halt the construction of the... bridge and [that] the findings of this inquiry may affect the reputations of some persons involved'.[21] The proponents of the 'women's business' did not appear nor were they represented before the Commission. In spite of this, the Commission proceeded to make a number of key findings on the questions before it, the most important of which was that the 'women's business' was fabricated.

It is not possible to provide any comprehensive review of the Royal Commission Report here. However, its findings and conclusions raise some significant issues about the way that the dominant legal system assesses Aboriginal cultural heritage. The Commission's findings on the issue might be briefly summarised: the proposal to build a bridge was widely publicised and 'could scarcely have escaped the attention of persons with an interest in Hindmarsh Island'; in 1990 archaeological and anthropological surveys disclosed no Aboriginal sites 'and no extant mythology'; there was no indication of Aboriginal objections to the bridge until October 1993; after that Aboriginal objections were based on archaeological sites; during the early part of 1994 stories about the spiritual significance of the land and 'women's business' began to emerge; there were some meetings at which men suggested the existence of 'women's business'; the 'women's business' was unknown and unrecognised in the literature, was unknown to other Ngarrindjeri women and unknown to the 12 Ngarrindjeri women who gave evidence to the Commission;[22] if the 'women's business' existed some people would have known about it; and the public statement of Doug Milera about fabrication should be accepted, even though he had since retracted the statement.

Not only did the Commission not hear from the proponents of the 'women's business', it placed little emphasis on the absence of that evidence. Significant emphasis was

placed on the lack of any recorded information about the 'women's business' by ethnographers without any analysis of the limitations of such ethnographic work — for example the influence on Taplin of his christianising zeal or the fact that both Tindale and Berndt worked at a time when there had already been massive cultural disruption — and in the face of inconsistency in other ethnographic information (about genealogies). Inferences were drawn from the absence of earlier opposition to the bridge or widespread knowledge of the 'women's business' without alternative explanations being explored. Emphasis was also placed on the absence of Aboriginal opposition to the building of the barrages and ferry installations in the 1930s and 1950s with no exploration of possible explanations for this. Finally and most importantly, the history of dispossession and dispersal of Ngarrindjeri people was referred to by the Commission but appeared to play no part in its conclusions. There was no consideration of the impact of that history on the transmission and transformation of cultural heritage as a basis for the beliefs entailed in the 'women's business' nor of this history as an explanation for the lack of earlier opposition.

As a forensic exercise firmly based within the dominant legal culture, the Royal Commission may be subject to critical comment. As a process for discovering and evaluating Aboriginal cultural heritage it is an example of the inadequacies of that legal culture in giving a voice to Aboriginal defined 'truths', values and meanings.

Conclusion

Conflicts between protection of Aboriginal heritage and development projects, or even low impact, inconsistent uses of land, will inevitably arise for resolution as they have in the case of the Hindmarsh Island marina development and bridge. How these might be resolved while still maintaining the integrity of Aboriginal cultural values and heritage remains at issue. The different narratives surrounding the *Hindmarsh Island Bridge* case, the manner in which these have been played out in the legal system and the privileging of the dominant narrative suggests that current regimes and processes for the protection of Aboriginal cultural heritage, within Aboriginal terms, are inadequate. It is difficult to foresee how the dominant system can provide protection when its mechanisms for protection ultimately require intrusions into that heritage with little or no place for Aboriginal voices. Perhaps the Evatt Review of the *Heritage Act* might provide some answers.

References

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2. *Chapman v Tickner*, unreported, Federal Court, 15 February 1995 at 14.
3. For a detailed discussion of the Act in relation to this case and *Douglas v Tickner* (the *Crocodile Farm* case) see N. Hancock, 'Proof of Aboriginal Cultural Heritage and the Public Interest', in this issue of *Alt.LJ*. See also, by the same author 'How To Keep A Secret: Building Bridges between Two "Laws"', (1995) 3 *Aboriginal Law Bulletin* 4.
4. *Tickner and Ors v Chapman and Ors*, unreported, Federal Court, 8 December 1995.
5. *Report of the Hindmarsh Island Bridge Royal Commission, (Royal Commission Report)*, Adelaide, 1995, p.312.
6. *Royal Commission Report*, p.311.
7. *Royal Commission Report*, p.194
8. *Royal Commission Report*, p.299.
9. *Royal Commission Report*, pp.41-45.
10. *Chapman v Tickner*, ref. 2, above, p.112.
11. Chapman v Tickner, ref. 2, above, p.119.
12. This material included the affidavit and oral evidence of the staff member as well as the fact that the Minister produced two statements of reasons for the decision, the first of which excluded reference to his having *considered* the representations.
13. *Chapman v Tickner*, ref. 2, above, pp.128-9.
14. *Chapman v Tickner*, ref. 2, above, p.124.
15. *Chapman v Tickner*, ref. 2, above, p.129.
16. *Tickner and Ors v Chapman and Ors*, ref. 4, above, at 30.
17. The Aboriginal Legal Rights Movement unsuccessfully challenged the validity of the Royal Commission: *ALRM v State of SA & Stevens*, Full Court of the Supreme Court of South Australia, 26 July 1995.
18. *Hindmarsh Island Bridge Royal Commission Rulings on Preliminary Issues*, p.2.
19. *Royal Commission Report*, p.5.
20. *Royal Commission Report*, p.7.
21. *Royal Commission Report*, p.7.
22. *Royal Commission Report*, pp.288-97.

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1. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s.3.
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5. *Mason v Tritton and Anor* (1994) 34 NSWLR 572.
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7. *Mason v Tritton*, above, per Priestley JA, at 599.
8. *Mabo (No.2)*, above, per Brennan J, at 60.
9. *Mabo (No.2)*, above, at 61 and per Deane and Gaudron JJ, at 110.
10. *Mabo (No.2)*, above, per Deane and Gaudron JJ, at 110.
11. s.237, *NTA*.
12. *Re Irruntyju-Papulankutja Community*, (1995) unreported, National Native Title Tribunal, WO95/7, per Deputy President Seaman QC, at 11.
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