

I make the following submission in relation to the Indigenous Heritage Law Reform proposals.

In response to question 11.1, I submit the proposals do not adequately address the complex legal issues associated with the confidentiality of Aboriginal spiritual beliefs.

Some of those issues emerged in the litigation challenging the declarations made in relation to the Broome Crocodile Farm and the Hindmarsh Bridge.

I was lead counsel for Minister Tickner in some of the leading cases on the existing legislation.

Tickner v Bropho (1993) 40 FCR 183 (the Swan Brewery case)

Tickner v Chapman (1995) 57 FCR 451 (the Broome Crocodile Farm case)

Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia (1996) 67 FCR 40 (the Hindmarsh Bridge case)

I was consulted extensively by The Honourable Elizabeth Evatt in the preparation of her report.

I have not been consulted in the preparation of the present report- indeed I became aware of it only this afternoon.

In support of the view that the proposals are inadequate I enclose an electronic version of an article which deals with the problems and possible solutions.

A revised version of the article has been published as a Chapter in Peter Cane, Carolyn Evans and Zoe Robinson (editors), Law and Religion in Theoretical and Historical Context (Cambridge University press, 2008)

ATTACHMENT TO SUBMISSION

LAW RELIGION AND SOCIAL CHANGE CONFERENCE

PROCEDURAL FAIRNESS AND THE PROTECTION OF SECRET INDIGENOUS SPIRITUAL BELIEFS

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Conventional administrative law procedures provide a fundamental obstacle to protection of Aboriginal cultural heritage. The difficulty arises because many Aboriginal cultural or spiritual beliefs are inherently secret or confidential. Procedures for protection of Aboriginal cultural heritage involve an inquiry and reporting process to which ordinary administrative law requirements, including natural justice or procedural fairness, apply.

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Disclosure of secret or confidential knowledge, as part of this process, may itself be contrary to Aboriginal law or tradition. Accordingly, the very procedures established for the purpose of protecting Aboriginal tradition may act as a disincentive to utilization of those procedures by Aboriginal people.

The paper will examine the capacity of the Australian legal system to protect Aboriginal spiritual belief, in particular, the capacity to protect secret spiritual knowledge where ordinary common law principles of procedural fairness require full disclosure.

The issue arises where an Aboriginal person or group seeks protection of a spiritually significant area or native title rights. In order to satisfy the evidentiary onus the applicant must disclose the basis of the claim to the decision-maker, who may be a Minister, Aboriginal Land Commissioner, Native Title Tribunal member or Federal Court Judge.

The application may adversely affect other interests, for example, mining or other development interests, who may seek to oppose the application.

Common law procedural fairness principles ordinarily require full disclosure of a disputed application to opponents of the application.

Difficulties arise in applying these ordinary disclosure requirements in circumstances where, according to Aboriginal tradition, knowledge must be restricted, for example knowledge of a particular spiritual belief may be restricted to particular elders or to persons of a particular gender. Thus knowledge may be restricted to initiated adult males (men's business) or to females (women's business). Aboriginal reluctance to disclose secret beliefs has in some cases lead to protection applications being made at a very late stage of a development proposal, leading to allegations that Aboriginal stories have been invented or fabricated for ulterior purposes. In other cases, disclosure requirements have lead to withdrawal of the submissions supporting protection applications. Forced disclosure of spiritual beliefs may have the effect of destroying the culture that is sought to be protected. Disclosure orders made in one case may lead to a 'drying up' of other applications, defeating the purpose of protection legislation.

Arguments have been advanced that information concerning certain traditional Aboriginal spiritual beliefs is inherently secret and should be capable of attracting a new category of public interest immunity. It has also been argued that the public interest in the administration of justice requires that those opposing an Aboriginal application have full access to the submissions supporting the application and a proper opportunity to counter them.

The paper will examine cases in which these issues have arisen and possible solutions.

Freedom of religion is accepted as a basic norm. Australia is a party to the International Covenant on Civil and Political Rights which relevantly provides 'Everyone shall have the right to freedom of...religion'.² Section 116 of the Australian Constitution relevantly

² Article 18.

provides that the Commonwealth shall not make any law for establishing any religion ...or for prohibiting the free expression of any religion. Commonwealth legislation, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

1. Australian law purports to protect

2. characteristics of ab belief

2(a) is it religion

The Heritage Protection Act

Native Title Act s 82(2)

3 procedural requirements – dilemma

4. decide abo issues by abos

5 Features of ab religion

6. secret/non disclosure/ known only to a few

7. latst minute disclosure

8. irrationality

casesaboriginal Sacred Sites Protection Authority V maurice; Re the Warumunga land Claim (1986) 10 FCR 104

Tickner v Bropho (1993) 40 FCR 183

Evidence Act s 130

junction waterhole

broome

hindmarsh

directions re evidence

native Title Act s 82

recommendations

Are Aboriginal traditions and spiritual beliefs properly considered as ‘religion’?

I am neither an anthropologist nor a theologian. Let me simply quote from a paper by one of Australia's most outstanding anthropologists

P24 All Aboriginal myths postulated some sort of entity pre-existing independently before the present system p25. Power or energy was part of the primordial scene. The power itself and the right to use it were both speciated and individuated. A man with the right ritual, which might take many years to acquire, could release from the sacred site the life essence and potential stored therein. The world was made of determinate relationships in which the relevance of anything to anything else was established. For example, there was a belief in unbroken lines of descent and the country of each descent group had from the beginning given soul and body to clansmen. Each small localized descent group has its own territory, its own idiosyncratic heritage of stories, songs, sacred places and ceremonies

P 23 'The Dreaming, as activity, is represented as a continuing highway between ancestral superman and living man, between the life-givers and the life, the countries, the totems and totem-places they gave to living men, between subliminal reality and immediate reality

P24 initiation rites : no boy 'becomes' a man; other men 'make' him a man

P28 initiation rites were consciously concerned to induct males by stages into the fellowship of the most senior men who understood the religious mysteries in part or whole. The ultimate purpose was to ensure the passage to and retention by the rightful persons of the knowledge required for the continuance of life

P28 The aborigines acknowledged that men's lives were under a power or force beyond themselves, they venerated the places where such power or force was believed to concentrate, they imposed a self-discipline to maintain a received tradition relating to the provenance and care of such power,

P28

There was no element of direct petition, or prayer

P30 but men cooperated ritually with unseen powers at holy places and on high occasions to further a life-pattern

Tempting to approach younger members of a community who may have a better command of English evatt 83

Men may have general awareness of women's rituals and women of men's rituals but they will not have specific knowledge about important sites and are not able to speak about them. Men will not disclose details to women and vice versa. Thus in the Broome Crocodile Farm case a report by a female anthropologist about a male initiation site was unreliable.

Burchett J in Hindmarsh

Indigenous people have a rich spiritual and religious tradition which informs their customs and their ceremonies

Need to protect cultural and religious sites

May be no special distinguishing physical features – may be a ceremonial place, such as an initiation site, or a birthing or burial site

When an application is made and a question arises as to the authenticity of claims relating to traditional Aboriginal knowledge or beliefs, that dispute falls to be determined according to traditional common law processes.

Orally transmitted cultural knowledge

Australian courts do not give weight to oral tradition eg Yorta

Orally transmitted material is either treated as inadmissible or is given little weight

There is no single Aboriginal religion. Before European settlement, there were many hundreds of distinct Aboriginal communities and many hundreds of languages. There was considerable religious diversity. A common thread was a version of what is now referred to as the 'Dreaming' stories about ancestors, spirits, a relationship with physical sites and sacred objects and associated rituals and ceremonies. Spiritual powers played a major role in Aboriginal life. Many stories, or myths, relate to particular places and objects. Living people are connected mystically to places. These religious beliefs govern social relations and customs, including initiation and burial. Access to religious knowledge is a basis for power in the community.

Many beliefs and ceremonies are gender related. For example, women have beliefs rituals and ceremonies, particularly relating to puberty and childbirth, in which men do not share. These beliefs and rituals form part of the religious life of the community. It is evidenced through knowledge, songs, dances stories, myths.

The culture is an oral one. Certain knowledge may be restricted to particular elders whose duty it is to guard that knowledge and pass it on selectively including, at an appropriate time, passing it on to the succeeding generation. Elders 'own' stories, songs and dances. Only the elder who 'owns' the knowledge has the authority to speak about it. The authority of the elders is accepted.

The dilemma : to protect their law they have to break their law. Anthropologists identified a spiritual affiliation to land. This affiliation has come to be recognized in Australian law.

Maurice

57 The information relating to sacred sites which was sought to be adduced in *Maurice* had been obtained from the Aboriginal custodians under an assurance that the information would be kept confidential: see Toohey J at 121-122. To be able to perform its statutory functions, the Sacred Sites Authority needed to be able to offer that guarantee of confidentiality to the Aboriginal suppliers of information, and if confidentiality could not reasonably be expected by them, sources of information were likely to decrease or dry up. Moreover the public disclosure of the information could result in the suppliers of information being held accountable by other Aboriginals. This would be inimical to the public interest object of providing proper protection and respect for the rights and beliefs of the Aboriginal people of Australia: see Bowen CJ at 110 and Woodward J at 114. Against these aspects of public interest which favoured the exclusion of the evidence, it was necessary to weigh the public interest in the proper administration of justice which requires that evidence necessary to elucidate the true facts should be available. However as members of the Full Court in *Maurice* observed, such availability does not necessarily require disclosure to the public at large, or even to all those participating in the proceedings of a court or tribunal: see Woodward J at 115 and Toohey J at 119, 130. The Aboriginal Land Commissioner had proposed that the evidence be received in camera, that only the Commissioner, his associate, counsel assisting, counsel for the Attorney-General for the Northern Territory and possibly his consultant anthropologist and the researcher who gathered the material would be present, and that use of information learned in the process would not be permitted other than for the purpose of the land claim. The Court observed that these restrictions went a long way towards reducing the strength of the public interest argument against disclosure: see Woodward J at 115 and Toohey J at 130-131. The Court held that the Aboriginal Land Commissioner had not erred in the balancing exercise required between the competing public interests in ruling that the confidential information should be received subject to those restrictions.

Pre-contact Aboriginal history is of course based entirely on oral tradition

Oral communication remains the preferred mode of communication of many Aboriginal people

Doreen Kartinyeri, custodian of the restricted orally transmitted knowledge relating to Hindmarsh island and the surrounding waters

The secret envelopes
Disparaged in the media lampooned mocked...

Had the envelopes contained a confidential confession from a Catholic priest, would the reaction have been different³

Broome 67 FCR 40, 53-54

³ Christine Nicholls, Literacy and Gender, *Journal of Australian Studies* no 48 (May 1966)59, 67

Procedural fairness at 52-55

The Hindmarsh island Bridge controversy arose out of a proposal to build a bridge to improve access to Hindmarsh Island in light of proposals for a marina and other real estate development. An anthropological survey prepared by Mr Rod Lucas found no significant Aboriginal heritage objections but recommended further consultation with Aboriginal bodies. After it became public knowledge that work on the bridge was about to commence, an Aboriginal organization applied to the Minister seeking protection of sites under the *Heritage Protection Act*. The Minister made an emergency declaration under s 9 and appointed Professor Saunders to prepare a report under s 10. Evidence was given to Professor Saunders concerning restricted women's knowledge. An anthropological report, prepared by Dr Fergie, referred to the archaeological significance of the area and records what in places is referred to as secret women's knowledge and in places as secret oral tradition. The content of that knowledge or tradition was included in two appendices, placed in envelopes marked 'To be read by women only'. These appendices became known as the secret envelopes. Professor Saunderson's report concluded

Hindmarsh and Mundoo Islands and the waters surrounding them have a supreme spiritual and cultural significance for the Ngarrindjeri people, within the knowledge of Ngarrindjeri women, which concerns the life force itself. If destroyed, the Ngarrindjeri people believe they will be destroyed. ... Dr Fergie's report describes the area... as 'crucial for the reproduction of the Ngarrindjeri people and of the cosmos which supports their existence. The adequate functioning of this area is vital to Ngarrindjeri existence'.

On 9 July 1994 the Minister made a Declaration under s 10 of the Act banning any act that would desecrate any part of a defined area, effectively banning construction of the bridge. Motions for disallowance of the declaration were moved and defeated, in both houses of the Parliament.⁴ A judicial review application was however successful, and the decision to make the declaration was quashed on two grounds.⁵ First, the notice published by Professor Saunders under s 10 of the Act was technically deficient in not adequately identifying the area and purpose of the application; it followed that the whole process was fundamentally flawed. Secondly, the Minister had not personally 'considered' the representations.⁶ He had not read the secret envelopes but had relied on advice from a female adviser that 'there was nothing contained in them which does not support the information in Professor Saunders' report'. Because the original notice was flawed, this second defect could not be remedied by referral back to the Minister. The Minister's appeal was unsuccessful.⁷

⁴ Senate, 11 October 2004, House of Representatives, 9 November 2004.

⁵ *Chapman v Tickner* (1995) 55 FCR 316.

⁶ *Tickner v Chapman* (1995) 57 FCR 451, 461-2, 478, 493

⁷ *Tickner v Chapman* (1995) 57 FCR 451.

Following dissent within the Ngarrindjeri community and claims that the 'women's business' was fabricated, the South Australian Government appointed a Royal Commission. The South Australian Hindmarsh Island Bridge Royal Commission reported on 19 December 1995 that the 'women's business' had been fabricated for the purpose of obtaining a declaration under the *Heritage Protection Act* to prevent the construction of the bridge. The Commission ignored critical evidence, for example, the evidence of historian Betty Fisher whose notes of conversations with Aboriginal elders taken in the late 1960's early 1970's recorded that Hindmarsh Island was a significant place for women and that restricted women's practices took place there.⁸ The Commission's conclusions rested in large part on late emergence of 'women's business' and supposed irrationality of women's business.

The original applicants for the declaration did not give evidence to the Royal Commission. Their participation was limited to making a statement through counsel at the start of formal hearings which gave their reason for not doing so.

"We are deeply offended that a government in this day and age has the audacity to order an inquiry into our secret sacred spiritual beliefs. Never before has any group of people had their spiritual beliefs scrutinised in this way. It is our responsibility as custodians of this knowledge to protect it. Not only from men, but also from those not entitled to this knowledge. We have a duty to keep Aboriginal law in this country. Women's business does exist, has existed from time immemorial and will continue to exist where there are Aboriginal women who are able to continue to practice their culture."⁹

The contents of the secret envelopes were not part of the evidence before the Commission.

Also on 19 December 1995 a further application for a s 10 declaration was made to the Commonwealth Minister, Mr Tickner. In response to a request from the applicants, the Prime Minister designated a female Minister, Senator Rosemary Crowley, to act on behalf of Mr Tickner. Senator Crowley appointed a Federal Court Judge, Justice Jane Mathews, to prepare the report required under s 10. The Federal Government changed and the new Minister, Senator John Herron, refused to arrange for a female Minister. When told by Mathews J that a male Minister would read her report and that, in light of the Full Court's decision in *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia*,¹⁰ all material they provided would have to be made available to opponents of the application, the applicant women withdrew their evidence of the culturally restricted knowledge. One leading writer described the dilemma the women faced

⁸ Mathews J had the notes tested and the results confirmed Mrs Fisher's account that she wrote the notes in the late 1960's or early 1970's (p 49, Mathews Report).

⁹ *Chapman v Luminis*, [327].

¹⁰ (1996) 66 FCR 40.

Insofar as their concern about the bridge project relates to women's beliefs, they need to specify those beliefs in order to have any chance of gaining the protection of the Act. But if they specify those beliefs in circumstances where they must be read by a man, they violate the very laws and beliefs which they are concerned to protect.¹¹

Mathews J's report was delivered in June 1996. In the absence of the evidence concerning restricted knowledge, Mathews J concluded that there was insufficient material to support a declaration. The dissident Ngarrindjeri women, who had denied the existence of the secret women's knowledge, did not participate in the inquiry process conducted by Mathews J.

The dissident women successfully challenged the validity of the appointment of Mathews J. On 6 September 1996, the High Court held that the appointment was incompatible with her judicial office.¹² It followed that her report had no status under s 10.

The s 10 application was therefore still outstanding. In addition, a fresh s 10 application was lodged. The new Minister, Senator Herron, refused to appoint a reporter¹³ but introduced legislation to prevent the making of a declaration in relation to the Hindmarsh Island Bridge area.¹⁴ A challenge to the validity of the legislation failed.¹⁵

In subsequent Federal Court proceedings brought by the Chapmans against the Minister, the reporter (Professor Saunders) and the anthropologist (Dr Dean Fergie), seeking to recover losses following the making of the declaration, von Doussa J was not satisfied that the restricted women's knowledge was fabricated or that it was not part of genuine Aboriginal tradition.¹⁶ That finding was all that was technically necessary to dismiss the application brought by the Chapmans. Von Doussa J went much further. He referred to evidence that the relevant knowledge was part of an oral tradition handed down by female relatives of preceding generations and went on to hold that knowledge handed down in that way clearly constituted part of 'the body of traditions, customs and beliefs' of Ngarrindjeri people.¹⁷ He considered the nine Ngarrindjeri women who gave evidence concerning restricted women's knowledge as part of genuine Aboriginal tradition to be credible witnesses who genuinely held those beliefs.¹⁸ He had previously ruled that Aboriginal tradition confined the disclosure of restricted women's knowledge to Ngarrindjeri women chosen by those who possessed the knowledge as appropriate to be entrusted with it.¹⁹ Von Doussa J took evidence in closed session and considered 'the confidential evidence shows that according to the tradition asserted, Hindmarsh Island,

¹¹ Garth Nettheim, *Aboriginal Law Bulletin*, May 1966.

¹² *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

¹³ Notwithstanding his clear legal obligation to do so, *Tickner v Bropho*. **ADD CITATION**

¹⁴ *Hindmarsh Island Bridge Act 1997*.

¹⁵ *Kartinyeri v The Commonwealth of Australia* (1998) 195 CLR 337.

¹⁶ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106, summary, [12], reasons, [400].

¹⁷ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106, [275].

¹⁸ *Ibid.*, [317]; see also [319].

¹⁹ *Chapman v Luminis Pty Ltd (No 2)* (2000) 100 FCR 229, 243-245, [40]-[50].

Mundoo Island and the surrounding waters are not sacred because of beliefs associated with arcane practices which once took place on Hindmarsh Island and Mundoo Island (see Commission Report p 236), but rather, the practices are a manifestation of a spiritual belief about those Islands and the surrounding waters. Important to that knowledge is the Goolwa Channel. According to the belief, the spiritual importance of the Islands and surrounding waters will be injured or desecrated if Hindmarsh Island is linked to the mainland. The confidential evidence indicates that the secret envelopes offered an explanation why that would be so.²⁰ And he methodically analysed and rejected the ‘planks’ on which the Commissions conclusions were based.²¹

Broome crocodile/procedural fairness

In *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* the Full Federal Court held that the Minister, and the Minister's nominated reporter, were obliged to accord procedural fairness to parties whose interests would be directly and substantially affected by a s 10 declaration. The obligation extended to making available to those interested parties an account of the Aboriginal tradition relied upon by the applicants for a declaration. Where that tradition involved information treated as confidential by the applicants, the obligation was held nevertheless to subsist. The court commented that in the circumstances of that case there was no real practical difficulty which prevented the reporter providing the material in some form for comment and in that way affording the opportunity for interested parties to make their answer (at 52 - 55).

Law reform Commission Report into the Recognition of Aboriginal Customary laws
Report no 31 vol 1, ch 23-26 – re taking of Aboriginal evidence

The Christian missionaries forbid Aboriginal children in their custody from using Aboriginal languages and told their Aboriginal children that their Aboriginal beliefs were sinful

For the Aboriginal women to give evidence as to the detail of their traditional beliefs would have broken their own traditional law

The very process was contrary to Aboriginal law²²

Secret sacred matters are well recognized in the literature on Australian Aboriginal cultures.

In some areas, restrictions based on gender are amongst the most conspicuous... In others... identity, affiliation, age, initiation status, specialist knowledge and the like may be important determinants of access to and control of ‘secret matters’.

²⁰ Ibid, [343].

²¹ [332]-

²² Elizabeth Mary (Betty) Fisher, *Subservience, Concealment and Impudence*, *Journal of Australian Studies* no 48 (May 1966) 52, 55.

Hindmarsh

Fergie report

Revelation of the secret knowledge was negotiated and authorized by a representative group of Ngarrindjeri women²³

Ultimately the issue is not whether we share the belief. I do not share the belief of Christians in virgin birth, resurrection and so on. But I respect those beliefs. The issue is whether beliefs are genuinely held

Client legal privilege

There is no doubt that privilege 'detracts from ..fairness'²⁴

Native Title Act

The *Native Title Act 1993*, as originally enacted, provided that the Court was not bound by the rules of evidence.²⁵ The Act went on to provide that, in native title proceedings, the Court '*must* take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait islanders'.²⁶ Following a change of Government, the relevant provisions were significantly amended. Now the rules of evidence apply unless the Court otherwise orders;²⁷ the Court '*may* take account of cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, *but not so as to prejudice unduly any other party*'.²⁸ The Federal Court Rules make specific provision relating to cultural evidence of a confidential or secret nature in native title proceedings including the making of orders relating to presentation of evidence about cultural matters and restricting access to documents.²⁹

2(a) Is it religion

Church of the New faith v Commissioner of Pay roll Tax (Vic) 1983 154 CLR para 12
And Sir James Frazer, in a passage in his *The Golden Bough* (abr.ed.(1954), p.50) cited by Young C.J. in the present case, confirms the opinion of Latham C.J.:

"There is probably no subject in the world about which

²³ Fergie report

²⁴ *Grant v Downs* (1976) 135 CLR 674, 686.

²⁵ S 82(3).

²⁶ S 82(2), emphasis added.

²⁷ S 82(1) as amended by *native Title Amendment Act 1998*, No 97 of 1998.

²⁸ S 82(2), emphasis added.

²⁹ Federal Court Rules, O78, R 33.

opinions differ so much as the nature of religion, and to frame a definition of it which would satisfy everyone must obviously be impossible." (at p133)

para 17 We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief,

Do not fit the mainstream western model of belief in one God who is seen as the Supreme Being, Creator and Ruler of the universe, understood in some kind of personal way and with whom man can or should have a relationship. Of course there are religious traditions without a God.

Compare *Malnak v. Yogi* (1979) 592 F (2d) 197, at p 199 three criteria were provided: first, the nature of the ideas in question - they must be "ultimate" ideas dealing with matters such as the meaning of life and death, man's role in the universe, the proper moral code of right and wrong and the like; second, the group must lay claim to an ultimate and comprehensive truth; third, formal external or surface indications such as services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation etc.

The heritage protection act

Only 4 s 10 declarations made (Evatt, 2.28)

Old Swan Brewery, June 1989 (later revoked)

Junction Water Hole (May 1992) – for 20 years, remains in force

Broome Crocodile farm, April 1994 - overturned by Federal Court

Hindmarsh Island (July 1994) – overturned by Federal Court

6.

Evatt 4.1

Restrictions on access to certain kinds of information are a central feature of traditional Aboriginal life. – an issue for Aboriginal people in their interactions with non-Aboriginal people.

Accommodating these restrictions in non-Aboriginal laws and procedures

There continues to be a lack of understanding in the non-Aboriginal community about the importance to Aboriginal people of this element of their culture

Much Aboriginal cultural and spiritual knowledge is of a secret and sacred nature. According to Aboriginal law it must be treated as highly confidential, even between Aboriginal people of the same group. The right to such knowledge may need to be earned and some members of an Aboriginal group may never be eligible to receive it. Procedures such as investigation, public reporting and registration, in themselves are contrary and damaging to Aboriginal traditions of privacy and the sanctity of spiritual intellectual property, quite apart from any threatened physical damage.³⁰

Evatt 4.8

Sites, areas and objects derive part of their power from the secrecy surrounding them.³¹ Requiring Aboriginal people to reveal restricted knowledge may detract from that power and undermine their significance.

4.9 ...customary law restrictions on information and knowledge about an area, site or object underpin and define social relationships

4.11

...requiring Aboriginal people to make restricted knowledge public, either to non-Aboriginal people or to other Aboriginal people, undermines the complex web of traditional social relationships.

4.13 Secrecy and significance are inextricably linked. Information and knowledge about important Aboriginal sites is by its nature restricted. The restricted knowledge is part of the substance of the site and its traditions. A key obligation of the person who is responsible for caring for and protecting the site is to protect and keep restricted knowledge about it.

4.15 From the Aboriginal point of view then, the key to protecting their significant sites and areas is to maintain the customary laws about information and knowledge about the site

This must be the starting point for any law which aims to protect...

³⁰ Submission from NLC to Evatt, quoted Evatt 2.34

³¹ Evatt cites Morphy p111.

The common understanding of many of the witnesses in this case was that traditions, observances, customs and beliefs, particularly in Aboriginal communities that have been removed from their traditional lands and have become urbanised, may be known only to a few people. It was also common ground that the traditions controlling the transmission of traditional information may result in that information not being passed on until the old age of the person possessing it.³²

This is a permanent Dreaming place and only the traditional owners used to hear these stories that their grandparents told them. Now they are going to hear this story all over the place. This dam has made the story come out into the open; the story used to be really secret. Now other tribes are going to hear about it. It used to be secret for the Arrernte mob. Well now everybody is going to learn, and the white people as well are going to learn about it... We will have to give away our secrets again.³³

NPYWAC sub to Evatt, sub 29, cited Evatt 4.5

Aboriginal people are frequently caught by the most distressing dilemma of being required to demonstrate the significance of part of our Law when those very explanations are, by our Law, restricted. It amounts to being forced to break our Law to prove to Europeans that our Law still exists. It is blackmail of the worst sort because it threatens our culture, not just one or two individuals.

NPYWAC Cited Evatt 4.6...some knowledge is dangerous if it is made public or if it is used in any context by the inappropriate people

Cited 4.6 Knowledge of a site or ceremony is part of the substance of the *tjukurpa* and inappropriate use of that knowledge in itself threatens to unleash powers of which it is a part.

Evatt 4.7

Maintaining the restrictions on knowledge associated with sacred areas, sites and objects is critical to ensure that Aboriginal people are able to enjoy their fundamental right to maintain and practice their religion. Requiring Aboriginal people to divulge restricted information, and failing to protect it if it is revealed undermines Aboriginal religious belief and practices

7. last minute disclosure

³² *Chapman v Luminis*, [275]

³³ Female custodian, reported in Wooten, *junction waterhole (niltye/Tnyere-Akerte)* s 10 report, p 74.

Late emergence

Creates suspicion. The cynical claim that objections to development proposals are made up to suit the circumstances.

333 To the eurocentric mind accustomed to the open exchange of information, the late disclosure of an important claim or explanation which supports the interests of the discloser will be viewed with suspicion. However, it is now well recognised in this Court and I think widely in the community, that under Aboriginal custom not all information is open. Much cultural information is surrounded by restrictions on disclosure. Some cultural knowledge relating to sacred beliefs is highly secret. Some, though sacred, may be revealed in part. The concept of graded secrecy, that is layers of knowledge is recognised, where outer layers may be widely known, but inner layers, including knowledge as to the significance of the belief to the culture may be known to only a very small number of senior people in the clan who are considered to be its custodians. The transmission of restricted cultural knowledge is likely to be strictly governed by traditional customs and a system of respect which delineate by whom, to whom and in what circumstances the knowledge may be revealed. The phenomenon of eleventh hour disclosure when all means short of disclosure have failed to protect an Aboriginal tradition is also recognised. Dr Fergie in her report pertinently quotes from the Hon J H Wooten AC QC in his report under s 10(4) of the HPA on the proposed Junction Waterhole Dam, Alice Springs:

"The cultural gulf between European and Aboriginal attitudes to the acquisition and spreading of knowledge often makes it difficult for Europeans to appreciate why Aborigines appear loath to discuss a site until a development proposal appears to be well under way. Aborigines, working under long inherited laws of protection through secrecy, prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed. Europeans find this approach to be very frustrating and, because they do not understand it, claim that Aboriginal people find sites only after development proposals have been announced. From the Aboriginal point of view this appears to be a surprising attitude since Aborigines know that they must maintain secrecy unless ... the release of that knowledge is perceived, ultimately, to be the only way to protect an area." (Wooten Report, p 31)³⁴

³⁴ *Chapman v Luminis* [333], also quoted by Evatt at 4.3

From the Aboriginal perspective late emergence of tradition would not be indicative of fabrication: on the contrary, it is to be expected in the case of genuine sacred information of importance.³⁵

Evatt 4.12

It is not in the interests of miners or developers that they are not informed about the existence of a site or area of significance which needs protection until the project is well advanced and changes are difficult and expensive to make

EW therefore in interests of miners and developers to develop a new procedure that accommodates Aboriginal needs for confidentiality that will assist in identification of sites

8. Irrationality

One of the grounds on which the Hindmarsh Island Bridge Royal Commission found the 'women's business' was fabricated was its alleged irrationality.

The beliefs said to constitute the 'women's business' and Dr Fergie's elaboration of it, that is, the cultural significance of the area according to Ngarrindjeri tradition, and the threat of injury or desecration said to be posed by the construction of the bridge, are not supported by any form of logic...³⁶

Von Doussa J did not share this perspective

In terms of eurocentric thinking and logic, the explanation proffered does not provide an understandable explanation why the linking of Hindmarsh Island to the mainland would have the forecast devastating consequences

³⁵ *Chapman v Luminis*, [336].

³⁶ Commission Report, p 241.

for Ngarrindjeri society and culture. The restricted women's knowledge describes what is said to be a spiritual belief associated with creation and procreation. Spiritual beliefs do not lend themselves to proof in strictly formal terms. Their acceptance by true believers necessarily involves a leap of faith. To use lack of logic as a test to discredit those asserting a particular spiritual belief is to pose a test that is both unhelpful and inappropriate. I expect that non-Aboriginal people generally may have difficulty understanding many Aboriginal spiritual beliefs that are of profound importance to Aboriginal people. The asserted belief in this case is no different.³⁷

The reason why the construction of the bridge would constitute a use or treatment of the area in a manner inconsistent with Aboriginal tradition is stated: the permanent link is an affront to that tradition. At this point, the clash of cultures interrupts further understanding of the reason why in a manner that can be shared by non-Aboriginal minds. At this point, the reason why becomes the subject of spiritual belief, and unless one holds the belief the reason why is likely to be incomprehensible.³⁸

Wootten similarly rejected argument that significance should be judged by non-Aboriginal standards

"The issue should not be whether, judged by the norms and values of our secular culture or our religions, the sites are important, but whether they are important to Aboriginals in terms of the norms and values of their traditional culture and beliefs. In other words, the issue is not whether we can understand and share the Aboriginal beliefs, but whether, knowing they are genuinely held we can therefore respect them."³⁹

Directions re evidence

Chapman v Luminis no 2 at 63

directions which require that the evidence be received in camera, with each of the parties represented by one female legal practitioner, and that the evidence not be further disseminated without order of the Court.

³⁷ *Chapman v Luminis Pty Ltd (No 5)*, [391].

³⁸ *Ibid*, 392.

³⁹ Proposed Junction Waterhole dam Report, 7.1.10.

Recommendations

I have sought to establish that there is a major flaw in Australian legal system with respect to protection of Aboriginal religion. Australian law on its face purports to provide a regime for protection of Aboriginal religious traditions yet the scheme that is established fails to accommodate a fundamental aspect of Aboriginal religious belief, the secret/sacred nature of much traditional Aboriginal belief.

There is a need to recognize two fundamentally distinct steps in the protection process. The first step is the ascertainment whether a site or object is especially significant for aboriginal people. The second step is the balancing of Aboriginal interests against other possibly competing interests.

The second step, balancing of competing interests, is ultimately a matter for political judgment and properly a matter for ministerial determination. The first step, determination of significance, should not be a matter for the political process at all. Indeed, it should be a matter for determination by Aboriginal people by an appropriate Aboriginal process.

Don't ask an atheist whether a site eg of a miracle or vision of Mary is important to Christian people

Provision should be made protecting persons from requirements to disclose secret/sacred knowledge about Aboriginal heritage, along the lines of public interest immunity (without balancing?)