WOMEN'S BUSINESS: SEX, SECRETS AND THE HINDMARSH ISLAND AFFAIR

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> Our beliefs are in our hearts. They're our grandmothers' stories. Those who are interfering are interfering with our grandmothers' lore. It amounts to being forced to break our law to prove to Europeans that our law still exists ... it threatens our culture, not just one or two individuals. The stories belong to us and are part of Aboriginal women's stories in this country.[1]
>
> ...to address oneself to the other in the language of the other is, it seems, the condition of all possible justice.[2]

I. INTRODUCTION

The furore over the proposed bridge to Hindmarsh Island[3] tells a story, or a number of different stories, which weave in and out of one another to form a series of complex and interconnected narratives. These stories speak of the intersectionality of race and gender, and of the ways in which the experiences of Aboriginal women are fundamentally different from those of white women, or of Aboriginal men. They also tell a tale about 'knowledge' and credibility, about whose voices are valued and believed and, more significantly, about whose voices are disbelieved or dismissed for their failure to speak with the confident ring of 'authority'. These narratives contain comments on epistemology, the way that we 'know' things, and the dislocation which occurs when beliefs deriving from outside the discursive fields of western culture are examined by a

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1 D Kartinyeri, quoted in P McGeough, "Unfinished Business" *Sydney Morning Herald*, 27 May 1995, p 27.

2 J Derrida, "Force of Law The 'Mystical Foundation of Authority'", in D Cornell, M Rosenfeld, DG Carlson (eds), *Deconstruction and the Possibility of Justice*, Routledge (1992) 1 at 92

3 Hindmarsh Island is known as *Kumarangk* in the Ngarrindjeri language The anglicised place name will be used in this paper for the purposes of consistency as this is the way it is referred to in the administrative decisions being discussed.

system of administrative law premised upon its own particular claims to truth and 'objectivity'. Buried deep within this tale is also the legacy of dispossession, colonialism and of state intrusion into the private lives of Aboriginal people, which make it both more difficult and, at the same time, more imperative, that traditions and sacred beliefs be maintained.

This paper will examine the way in which courts at two different jurisdictional levels have considered the claims of the Ngarrindjeri women and their allegation that the building of a bridge linking Hindmarsh Island to the mainland would result in the destruction of sites which have great ritual significance. The focus is on the difficulties inherent in successfully asserting knowledge and maintaining credibility within a system of administrative law which is geared towards the claims of those who are not 'culturally different'. Subsequent political events have reduced the impact of these judicial pronouncements and this paper aims simply to provide a 'snapshot' or an 'overview' of the political context in which these legal decisions were made. The story of the Hindmarsh Island Bridge is still in the process of being told. However, it would appear that the voices of the Ngarrindjeri women, which were heard for one brief moment, have been silenced.[4]

The first part of this paper will focus on the legal regulation of Aboriginal people and the way in which 'the sacred' becomes distorted and made less credible when it is contained within the normative framework of administrative law. The idea that the private spiritual life of Aboriginal people is a matter of 'public interest' is scrutinised within the context of a history of pervasive state intervention in almost every sphere of Aboriginal life. The rigid dichotomies of legal thought and the problem that some rights, such as procedural fairness, are routinely used to 'trump' others, such as privacy, are then briefly considered.

The next section of this paper will focus on the idea that the controversy surrounding the Hindmarsh Island claim is due to the fact that it is Aboriginal *women's* knowledge which is being asserted. Feminist theories of intersectionality are used as a means of rendering visible the experiences of Aboriginal women which are of a very different character to those of Aboriginal men and those of white women.[5] The unique colonial history of Aboriginal women will be discussed in order to show the way in which the cultural knowledge of these women has been particularly vulnerable to desecration and destruction. A comparison of several recent Aboriginal heritage claims reveals that such debates take place within a framework of gender inequality.

The concluding segment of the paper examines concepts of credibility, hierarchies of truth and the role of the 'expert' as a means of unpacking some of the issues which appear to lie, unspoken, at the heart of the Hindmarsh Island affair.

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4 A brief chronology of the 'major' events in the Hindmarsh Island saga appears in the appendix. See also the 'Kumarangk is Ngarrindjeri for Hindmarsh Island' website <http://www.foe on.net/Kumarangk/chronsh.html>

5 J Stubbs and J Tolmie, "Race, Gender and the Battered Woman Syndrome. An Australian Case Study" (1995) 8 *Canadian Journal of Women and the Law* 122

II. RITES AND RIGHTS: SECRET KNOWLEDGES CONFRONT ADMINISTRATIVE LAW

According to legal theorist Patricia Williams, there are three features of thought and rhetoric which characterise 'theoretical legal understanding' in Anglo-American jurisprudence:

1. The drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication.
2. The existence of transcendent, acontextual, universal legal truths or pure procedures ... a worrisome tendency to disparage anything that is nontranscendent (temporal, historical), or contextual (socially constructed), or nonuniversal (specific) as 'emotional', 'literary', 'personal', or just Not True.
3. The existence of objective, 'unmediated' voices by which those transcendent, universal truths find their expression.[6]

These features may also be found within the epistemological framework of the Australian system of administrative law which, it will be suggested, is just as unaccepting of any claims not made in the language of 'objectivity, rationality and universality' as its American counterpart. The results of such reasoning are reflected in the legal system's inability to respond to the experiences of anyone who does not conform to the white, male, able-bodied, heterosexual, middle-class benchmark against which all things are measured.[7] The disadvantage experienced by Aboriginal people, and most particularly by Aboriginal women, has been institutionalised by virtue of their invisibility within the legal system. In this way 'the law' - whose failure to approximate 'reality' is particularly acute for those who do not conform to the norms upon which it is based - becomes decoupled from and irrelevant to 'life': "I understand the anxiety and anguish which is being caused to the women concerned, but the Court must focus upon legal interests and legal rights."[8]

In the process of forcing Aboriginal knowledges to fit into various legislative and curial definitions, the legal system continues to play a significant role in distorting what is 'known' about aspects of Aboriginal culture.[9] In almost every Aboriginal heritage protection claim brought to date, there has been a disproportionate amount of attention paid to the 'truth' of confidential knowledge, frequently at the expense of other, equally important, substantive concerns.[10] The emphasis given to confidentiality has had the effect of simultaneously trivialising Aboriginal beliefs, while at the same time 'othering'

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6 P Williams, *The Alchemy of Race and Rights*, Harvard University Press (1991) pp 8-9.

7 M Thornton, *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press (1996) pp 34-40.

8 *ALRM v South Australia* (unreported, Supreme Court of South Australia, Full Court, 26 July 1995) at 9, per Doyle CJ

9 JA Scutt, "Invisible women? Projecting White Cultural Invisibility on Black Australian Women" (1990) 46(2) *ALB* 4.

10 In the judicial reviews of the Hindmarsh Island decisions, as in many other Aboriginal heritage claims, the rights to privacy and religious freedom of the Aboriginal people involved have been subsumed in the drive for 'truth' and the attendant public scrutiny of Aboriginal knowledge which such processes inevitably entail.

them by making "this very ordinary method of preserving cultural knowledge" appear to be "exotic and incomprehensible".[11] As the Black Women's Education in Action Foundation has pointed out, in any conflict over Aboriginal heritage, it is necessary to look behind this fascination with secrets in order to uncover the real issue of 'who has the most to gain from these types of social rupture'.[12]

A. The Public/Private Dichotomy[13] and the Legal Regulation of Spiritual Knowledge

Aboriginal people, more than almost any other group within Australian society, have been the objects of legal examination, discipline and normalisation.[14] This legal control has been extended to encompass nearly every sphere of Aboriginal life, so that even decisions not to intervene are informed by the legal system and its fixed concepts of harm and relevance.[15] The legal regulation of Aboriginal sacred knowledges can be looked at using the analytical tools of feminist theorists who have examined the public/private division and exposed it as a malleable and political construct.[16]

Several important issues are raised by the public control of religious or spiritual knowledges, an area which has been regarded as one of the most private realms of human existence. The legislative framework designed to protect Aboriginal heritage is based on the assumption that Aboriginal people will, and should, rely upon the state for the 'preservation and protection' of their culture.[17] Importantly, the protection of Aboriginal sacred sites has been positioned within legal discourse as forming part of 'the public interest'. This placement has had the effect of opening such knowledges up to public scrutiny in a way that the

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11 Editorial, "Women's Business", *Black Women's Action in Education Foundation Newsletter*, June 1995, p 4

12 *Ibid*

13 In this section, the term 'the public/private dichotomy' is used to describe the way in which a 'private' area of human existence, religion, has been made 'public' in order to legitimise legal scrutiny. In some ways, this is the 'inverse' of the public/private dichotomy as it has traditionally been understood. However, as Katherine O'Donovan has pointed out, in demarcating the boundaries between what is 'public' and what is 'private' (and thereby immune from legal discussion), the law constitutes and defines both spheres. See K O'Donovan, in R Graycar and J Morgan (eds), *The Hidden Gender of Law*, Federation Press (1990).

14 See M Langton, "Representations and Indigenous Images", a paper presented at the Global Cultural Diversity Conference, Sydney, 28 April 1995, for a discussion of the obsession with controlling Aboriginal bodies, thereby reducing them to a concept which can be tamed and disciplined. These ideas about discipline, normalisation and control are derived from Michel Foucault's analysis of the rise of the prison in M Foucault, *Discipline and Punish*, Alan Sheridan (trans), Allen Lane (1977)

15 In *The Hidden Gender of Law*, note 13 *supra*, Graycar and Morgan discuss many instances where the particular 'harms' suffered by women because they are women have not been recognised as giving rise to 'damages'. Similarly, the authors describe cases in which the introduction of facts or experiences different from the 'norm' have been excluded on the grounds of 'irrelevance'. These exclusions suggest that the idea that the legal system is 'universal' or 'impartial' must be examined far more closely in order to discover *which* harms are being recognised as 'actionable' and *whose* experiences are 'relevant'

16 *Cf* M Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford University Press (1995)

17 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). The Act and its 'beneficial purposes' were judicially considered by the Federal Court in *Tickner v Bropho* (1993) 40 FCR 183 at 221, per French J

'private interests' of developers frequently are not.[18] In deciding not to grant an injunction to Ngarrindjeri women wishing to halt the Royal Commission, the Supreme Court of South Australia held that the rights and interests of the women as 'private individuals' were abrogated by the fact that: "What is involved here is the protection of Aboriginal cultural heritage, and for my part I accept that that also implicates the public interest".[19]

The underlying assumption in the case of the Hindmarsh Island Royal Commission was that as such knowledge is already in the 'public domain' as part of the 'public interest', there should be no objection to subjecting this knowledge to the legitimatising process of legal examination.[20] The questions of whether the private spiritual life of Aboriginal women is a suitable subject for legal scrutiny, or whether such knowledge should be regarded as 'public property', remain unasked.

A further dimension which could be added to the public/private equation in claims concerning Aboriginal sacred knowledge, is the idea that self-determination may also involve the taking back and 'privatising' of knowledges and beliefs which have hitherto been regarded as public. The 'public's interest' in the preservation of cultural knowledge might be better served if this knowledge was kept privately by its custodians. As Doreen Kartinyeri, the Ngarrindjeri woman at the centre of the Hindmarsh Island furore, has stated:

> When I got the envelopes back from Tickner, my first reaction was to burn them, but then I thought why should I, I might never have another chance to put it on paper and the Ngarrindjeri women deserve to know that.[21]

B. "I Don't Begrudge Them Having These Places, But Why Can't They Just Explain?"[22]

Critical race theorist Homi Bhabha has described the tension that exists in multicultural societies between the encouragement and creation of cultural diversity on one hand, and the containment of cultural difference on the other. In Bhabha's argument: "a transparent norm is constituted by the dominant culture

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18 Discussions of the 'public interest' in Aboriginal heritage appear in *ALRM v State of South Australia* note 8 *supra* at 1, 4, 8-9; *Chapman v Tickner* (1995) 133 ALR 74, per O'Loughlin J, *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (unreported, Federal Court, Carr J, 7 February 1994).

19 *ALRM v South Australia* note 8 *supra* at 4, per Doyle CJ.

20 "[T]he subject matter of the Commissioner's inquiry has been a matter of public controversy As it will appear, the plaintiff claims that the institution of the inquiry is unlawful But to the extent that the inquiry canvasses matters which are already well and truly in the public arena, using material already in the public arena, it is difficult to see that any harm can be done" *ibid* at 1

21 Doreen Kartinyeri, interview on ABC Radio National *Background Briefing* on Hindmarsh Island, 17 September 1995 As Dr John Stanton, Curator of the Berndt Museum, University of Western Australia, interviewed in the same program commented: "it's possible that things from the past have recently become secret, that's not to say they're not sacred, it's the entitlement of any society to make things secret . . it's what people believe. In that sense there aren't facts in the case, they're interpretations In that context, I don't think the issue is resolvable at all."

22 Bob Gray, Douglas Shire Deputy Mayor, referring to the closure of the Bouncing Stones area at Cape Tribulation as the result of representations by Kuku-Yalanji women who gave evidence as to the importance of the site to their cosmology, quoted in the *Cairns Post*, 6 September 1995, p 13.

which says that 'these other cultures are fine, but we must be able to locate them within our own grid'".[23]

The compulsion to embrace diversity, while simultaneously disadvantaging and normalising difference, is very apparent in most legal considerations of Aboriginal heritage claims. At a theoretical level, there is a recognition that those things which make Aboriginal culture special[24] are also those things that work against Aboriginal interests when they come into contact with the norms of legal procedure.[25] In theory, it is acknowledged that Sandra Saunders, the Director of the Aboriginal Legal Rights Movement is right to claim that "technicalities are white fella business".[26]

In practice, however, there is an implicit privileging of knowledges and interests that are capable of being 'proved' through the mechanisms of 'objective rationality' and that is why so many Aboriginal heritage claims are lost on procedural grounds.[27] Jan Pettman has documented the way in which Aboriginal history is often reconstructed in order to achieve the requisite legal standards of 'specificity' and 'certainty' needed to legitimate heritage claims.[28] The fact that

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23 H Bhabha, "The Third Space", in J Rutherford (ed) *Identity, Community, Culture, Difference*, Lawrence & Wishart (1990) 207 at 208. See also I Law, *Racism, Ethnicity and Social Policy*, Prentice Hall (1996).

24 These things include the fact that most Aboriginal cultural knowledge is generally: recorded orally, held by many different custodians, confined to people of a particular age, marital status or gender; often not referable to specific map grid references, made up of partial and frequently overlapping or contradictory 'truths'; and capable of becoming more or less secret or sacred over time

25 The fact that the Commonwealth legislation protecting Aboriginal sites is based on the idea that Aboriginal groups need only to show that they have beliefs concerning a particular region and the state will, as a result, step in to protect these areas from destruction, means that the state itself takes on the role of placing this knowledge within the framework of procedural law As well as this 'structural' recognition that legal technicalities are generally antithetical to Aboriginal knowledges, there are other more specific provisions such as s 27 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) which provides that "in any proceedings in a court arising under the Act, the court may, in the interests of justice and the interests of Aboriginal tradition, order the exclusion of the public or of the persons specified in the order from a sitting of the court and make such orders as it thinks fit for the purpose of preventing or limiting the disclosure of information with respect to the proceedings". This 'public interest privilege' accorded to evidence about Aboriginal sites has also been judicially approved on several occasions. *Cf Aboriginal Sacred Sites Protection Minister v Maurice* (1986) 65 ALR 247 at 256, per Woodward J: "a fresh category of public interest immunity should be recognised, covering secret and sacred Aboriginal information and beliefs" The orders which courts may make restricting access to confidential information in legal proceedings were extended to include legal practitioners in Justice Carr's decision in *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* note 18 *supra*.

26 Sandra Saunders quoted in A Gough, "A Bridge Over Troubled Waters", *Sydney Morning Herald*, 1 June 1995, p 15.

27 In each of the judgments discussed in depth here. *Western Australia v The Minister for Aboriginal and Torres Strait Islander Affairs* note 18 *supra*, *Chapman v Tickner* note 18 *supra*, and *ALRM v South Australia* note 8 *supra*, procedural fairness and the procedural aspects of reporting and notice provisions have been the determinative factors used by the courts to find against upholding orders made for the protection of Aboriginal sites and secret knowledges. In his study of the 10 challenges which have been made to protection orders under the *Heritage Act* to date, Richard Goldflam has found that only two of these decisions have been upheld after judicial review. In each case, it was the lack of 'consideration' given by the Minister to particular secret issues and/or the notice-giving or procedural aspects of the decision which were the reason for the order being quashed: R Goldflam, "Between a Rock and a Hard Place: The failure of Commonwealth Sacred Sites Protection Legislation" (1995) 74(3) *ALB* 13 at 14.

28 J Pettman, *Living in the Margins*, Allen & Unwin (1992) p 26. "Gungarakayn women reconstituted themselves in an idealised version of a past constructed in the context of requirements of land rights

such 'reconstructions' occur in order to bring Aboriginal experiences within the ambit of legal protection has been seized upon by sections of the media, some politicians and various members of the judiciary as evidence that the beliefs are fabricated. The testimony of Dorothy Wilson, one of the 'dissidents' in the Hindmarsh Island case, provides a vivid example of this process of 're-making' Aboriginal history:

> We went over to the shack where the men were and there was a lawyer there who said that what we had wasn't enough to stop the bridge - they had a map and pointed to it and said 'what does it look like?' They suggested to us that that map looked like a woman's 'privates'.... The only thing I'm disputing is that it was put into a secret envelope about the map and it was said that that map was handed down through the women, now that's not so.[29]

As mentioned previously, the way that the heritage legislation is structured means that Aboriginal people who wish to claim protection for a site are reliant upon the state and various 'experts' to act as their advocates. The mechanisms of reporting, mapping and declaring are all part of this process of 'translating' Aboriginal traditional beliefs into language which can be understood by the legal system. These mediated descriptions of Aboriginal knowledges frequently bear little resemblance to the way in which they are conceptualised by Aboriginal people, who may then contest the 'truth' of the representations themselves, once again opening the door for accusations of fabrication to be made.

This focus on rules of procedure and on the 'credibility' of evidence provides a valuable insight into the way in which Aboriginal interests in the protection of sacred sites have been routinely 'trumped' by the rights of others who clothe their claims in the persuasive, and 'actionable', language of procedural fairness.[30] As Doyle CJ noted in *ALRM v South Australia*, the types of rights invoked by Aboriginal people in defence of their sacred sites are of a kind which are not usually given much legal weight:

> The right to freedom and privacy and reputation are all said to be fundamental common law rights. But they are not rights of the type which give rise to a cause of action as such.[31]

In its determinations on questions of Aboriginal heritage protection, the judiciary has frequently revealed an inability to transcend the boundaries of that type of 'objectivity' which gives far greater credence to the more tangible, procedurally correct and 'quantifiable' demands of those who are not 'culturally different'.[32]

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legislation and hearings" Pettman also discusses the fact that 'tradition' is a difficult concept based on the assumption that pre-contact Aboriginal society is capable of being 'known' without the overlay of colonial history (p 24)

29 Dorothy Wilson interview on ABC Radio National *Background Briefing* on Hindmarsh Island, 17 September 1995.

30 R Goldflam, note 27 *supra*, p 14

31 *ALRM v South Australia* note 8 *supra* at 5, per Doyle CJ.

32 Arrernte woman quoted in H Wootten, "The Alice Springs dam and sacred sites" (1993) 65 *Australian Quarterly* 8 at 16: "The protection of property may be an important issue What it boils down to though is do we spend millions upon millions of dollars protecting the material culture of some, at the same time damning the spiritual/social culture of others?".

III. 'MARRYING THE MARGINS':[33] THE INTERSECTIONALITY OF RACE AND GENDER

Hindmarsh Island affair may be placed within the context of debates surrounding the role of Aboriginal women in 'traditional' society and the ongoing struggle of these women to have their rights as landowners or as custodians of sacred knowledge recognised. Aboriginal women have, almost without exception, been excluded from political, legal and bureaucratic processes of negotiation over sacred sites and, as a result, their interests have remained unrepresented.

This legacy of 'cultural invisibility' has meant that although the claims being made by Ngarrindjeri women in relation to Hindmarsh Island are no different in character from those discussed in the cases concerning the spiritual knowledge of Yawuru[34] or Waugyl[35] men, they have been treated in a very different manner. It is suggested that the reason that the sacred knowledges relating to Hindmarsh Island have proven controversial enough to require scrutiny by two separate Commissions of Inquiry, is that they are not assertions of an 'ungendered' (male) Aboriginal secret life, but are claims being made by Aboriginal women.

A. Slipping Through the Cracks: Essentialisms and Single-Axis Thinking

Many feminist legal theorists have criticised both the legal system for its 'single-axis' thinking in relation to women of colour and feminist theory for its 'essentialism', or failure to consider the differences which exist among women.[36] The invisibility of black women within both the ungendered 'race' and the seemingly white 'women' categories is most eloquently expressed in a collection of essays by black American women.[37]

The widely publicised failure of Aboriginal women to make use of the remedies available to them under the *Sex Discrimination Act* 1984 (Cth),[38] and

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33 K Crenshaw, "Demarginalising the Intersection of Race and Sex A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics" [1989] *University of Chicago Legal Forum* 139.

34 *Western Australia v Minister for Aboriginal & Torres Strait Islander Affairs* note 18 *supra*

35 *Tickner v Bropho* note 17 *supra*

36 CT Mohanty, "Feminist Encounters: Locating the Politics of Experience" in M Barrett and A Phillips (eds), *Destabilizing Theory*, Polity Press (1992) 74 at 75: "historicizing and locating political agency is a necessary alternative to formulations of the 'universality' of gendered oppression and struggles. This universality of gender oppression is problematic, based as it is on the assumption that the categories of race and class have to be invisible for gender to be visible. In the 1990s, the challenges posed by black and Third World feminists can point the way towards a more precise, transformative feminist politics. Thus, the juncture of feminist and anti-racist/Third World/post-colonial studies is of great significance, materially as well as methodologically" See also P Williams, note 6 *supra*, pp 6-7. Some of the vast body of literature on this topic includes: K Crenshaw, note 33 *supra*. N Duclos, "Disappearing Women. Racial Minority Women in Human Rights Cases" (1993) 6 *Canadian Journal of Women and the Law* 25. EC Cunningham, "Unmaddening: A Response to Angela Harris" (1991) 4 *Yale Journal of Law and Feminism* 155

37 GT Hull, PB Scott, B Smith (eds), *All The Women Are White, All The Blacks Are Men, But Some of Us Are Brave*, Feminist Press (1982).

38 S McKillop (ed), *Aboriginal Justice Issues*, Conference Proceedings No 21, Australian Institute of Criminology (1993) pp 174-5

the fact that the ALRM argued only on the basis of racial discrimination in its injunction application,[39] highlight the degree to which 'single axis' thinking has limited the legal choices being made available to Aboriginal women.

In any discussion of theories of 'intersectionality' and plurality, it is necessary to retain a strong sense of the interactive nature of the relationships between and within groups.[40] Mari Matsuda argues that:

> Subordination is a dynamic, not a static relationship. Structures of domination overlap and merge. The parties in a given dyad of domination can change places, depending on context.[41]

The 'dynamism' of subordination makes it possible for Aboriginal men to 'connive' with white men in the dispossession of Aboriginal women.[42] It also means that white women may participate in the oppression of Aboriginal women.[43] Such an analytical framework makes it possible for the power relations within any identified 'group' of Aboriginal women to be discussed:

> That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these as rhetorical gestures is necessary for any conception of justice. Such acknowledgment complicates the supposed purity of gender, race, voice and boundary; it allows us to acknowledge the utility of such categorizations for certain purposes and the necessity of their breakdown on other occasions.[44]

B. The 'Cultural Invisibility' of Aboriginal Women

The processes of the cultural imperialism which accompanied white invasion had the effect of destroying much Aboriginal sacred knowledge. Alongside this trivialisation of Aboriginal religion was the assumption that the patriarchal structure of Anglo-Australian culture was also the norm in Aboriginal societies. This 'two pronged' operation successfully made the ritual life of Aboriginal women culturally invisible and, as a consequence, this knowledge became even more vulnerable to destruction and desecration than the sacred knowledges of Aboriginal men.[45]

It is only recently that Aboriginal women have been 'restored' to the histories and ethnographies which purportedly described the lives of Aboriginal 'people'. As Larissa Behrendt has noted, the fact that women played an important spiritual role in Aboriginal society was not contemplated by those early anthropologists

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39 *ALRM v South Australia* note 8 *supra* at 5, per Doyle CJ.

40 P Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment*, Routledge (1991) pp 221-38

41 MJ Matsuda, "Pragmatism Modified and the False Consciousness Problem" (1990) 63 *Southern Californian Law Review* 1763 at 1772

42 P Brock (ed), *Women, Rites and Sites Aboriginal Women's Cultural Knowledge*, Allen & Unwin (1989) p xxii. Bell Hooks has described the dilemma confronting African American women when asserting that they have been subject to sexism See B Hooks, *Talking Back· Thinking Feminist, Thinking Black*, South End Press (1989) p 178

43 L Behrendt, "Black Women and the Feminist Movement: Implications for Aboriginal Women in Rights Discourse" (1993) 1 *Australian Feminist Law Journal* 27 at 31. See also B Hooks, note 42 *supra*, p 179.

44 P Williams, note 6 *supra* pp 10-11

45 JA Scutt, note 9 *supra*.

who described Aboriginal women as 'ritually impoverished'.[46] Most anthropological accounts of Aboriginal groups were shaped by the observer's own cultural subjectivities and expectations, including those of gender relations in their own societies. Coupled with this inherently sexist vision was the fact that the white, male anthropologist usually only sought out Aboriginal men as informants.[47]

The 'exhumation' of the history of Aboriginal women, which for so long was hidden from view by the assumption that history was made by men and Europeans, has involved a recognition that colonisation was gendered as well as racist. As John Upton notes:

> Although relegated by Anglo-Europeans to the edges of their own Aboriginal society, and then to the margins of the whole Australian society, Aboriginal women were not left alone. From the beginning women were taken for sexual services and later for menial labour and domestic service, used as a sexual or labouring commodity.[48]

The way in which the processes of colonisation affected Aboriginal women is most apparent in their stories and oral histories.[49] Many of the experiences of colonisation were shared by large numbers of Aboriginal women who often felt that the preservation of their sacred knowledges was one means of retaining a sense of identity in the midst of the massive social and cultural upheavals created by colonial policies. The destruction of the lines of cultural transmission through the forced removal of children and the relocation of Aboriginal families meant that many women were only vaguely aware of their spiritual heritage: "I feel such sadness and sorrow for those women. They have missed out on their culture ... They had a white life, a European life, an Anglo-Saxon life"[50]

Aboriginal women who have only a partial knowledge of the Dreaming are often very reluctant to pass on this knowledge as they are frequently unsure about their rights to know such information themselves, particularly if it has been imparted to them by a relative outside of the customary setting of ceremony.[51]

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46 Note 43 *supra* at 28. "Women played an important role spiritually within Aboriginal society. The rainbow serpent, the spirit of creation, was a female energy Spiritual rites were inherited through the mother. The place of conception and birth of a child were chosen by the mother, not the father. These places would have spiritual significance in a person's life."

47 J Pettman, note 28 *supra*, p 24

48 J Upton, "By Violence, By Silence, By Control: the Marginalization of Aboriginal Women Under White and 'Black' Law" (1992) 18 *MULR* 867 at 869.

49 *Cf* the stories of different groups of women as recorded in P Brock, note 42 *supra*. Doreen Kartinyeri told some of her story to *Background Briefing*, note 21 *supra*: "I was born in the mission in 1935 and I lived there until I was 10 when I was taken away by the Protector and put in a home I was expelled from school at 14 and so I returned to the mission and tried to learn all I could about my Aboriginal background I was told of Kumarangk 'women's business' by my Auntie Rosie and my Auntie Laura who said that prior to the establishment of the mission in 1854 there was 'women's business' all around the Lower Murray and on Kumarangk. The women's stories were told to me, I kept them to myself and just spoke to my daughter about it. It's very hard trying to live a European style of life and practise these things by yourself, you need to practise them as a community which is how they were done traditionally."

50 Mrs Muriel Ven Dery Byl, one of the Hindmarsh Island 'dissidents', quoted in D Jopson, "Sundered by the Secrets", *Sydney Morning Herald*, 26 August 1995, p 4.

51 P Brock, note 42 *supra*, p 87

The enactment of land rights and heritage protection legislation has turned the knowledge of Aboriginal people into a political contest in which the historical disadvantages faced by Aboriginal women are largely ignored:

> ... at a time when researchers are acknowledging the full extent of women's knowledge and power in Aboriginal society, the judicial system and the bureaucracy are dealing with Aboriginal men over rights to land. This has often been done with the connivance of the men, who are acquiring from their non-Aboriginal counterparts the conviction that control of land should belong to men. This attitude is further undermining the status of women throughout Aboriginal Australia, by bringing into question their land-based knowledge.[52]

C. A Comparison of 'Women's Business' with 'Men's Business' Claims

The Junction Waterhole mediation[53] in which sites relating to both men's and women's Dreaming were threatened by a proposed dam provides an interesting backdrop for the events being discussed in this paper. In that case, as with the Hindmarsh Island controversy, it was the women's claim which was placed under the media spotlight, and although Hal Wootten eventually held that the site should be protected, similar issues were raised. The fact that the Arrernte women were subject to intense scrutiny, while the Arrernte men (asserting very similar knowledges) were not, suggests that the media's preoccupation with secrets will be even greater if they belong to women and therefore become imbued with an 'eroticism' not found in 'men's business'.[54]

The recent 'Crocodile Park' case involving 'men's business' and the Hindmarsh Island case are strikingly similar. However, a comparison of the way in which these two claims were handled reveals that gender plays an important role in the legal determination of such cases.[55] In both instances, a series of consultative procedures was carried out after Aboriginal groups alerted various government organisations of their interests in the land. In each case, there are a number of overlapping and contradictory stories, while some members of each

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52 *Ibid*, p xxii.

53 Hal Wootten discusses the 'fetishisation' of the confidential aspects of Aboriginal knowledge in his report on the Alice Springs dam proposal, note 32 *supra* at 14 : "I can assure the curious that the confidentiality of the site is not because the information would be found titillating, shocking or even particularly interesting by Western standards. It simply lacks significance in Western culture, and I could not claim to appreciate its significance to Aborigines".

54 J Jacobs, "Earth Honouring Western Desires and Indigenous Knowledges" (1994) 53(2) *Meanjin* 305.

55 *Western Australia v Minister for Aboriginal & Torres Strait Islander Affairs* note 18 *supra*. In this case, a group of Yawuru men had gained a declaration under s 10 of the *Heritage Act* to protect an area of land which contained an 'initiates track' and important camp sites. The threatened development was a 'crocodile park' which would require substantial earth works and buildings to be erected on the land. Native title was also claimed in this case. Justice Carr found that the developers had been denied procedural fairness in the making of the ministerial declarations and quashed the decisions of the minister *Chapman v Tickner* note 18 *supra*. The Ngarrindjeri people had also been granted a s 10 order which prohibited the building of a bridge to Hindmarsh Island for a period of 25 years. The claim was based on the knowledge of Ngarrindjeri women who said that the waters of the Murray and the island itself had significance for reproduction and the renewal of life. Some Aboriginal men and Ngarrindjeri women subsequently claimed that the 'women's business' didn't exist and that it had been fabricated. The decision of O'Loughlin J to quash the declaration was made on the grounds of the denial of procedural fairness

Aboriginal community have claimed the area to be spiritually significant to them, others have said that they do not think this is the case.[56] The debate in each instance was removed from the people whose beliefs were being discussed and became the property of different 'experts'. The central fact at issue in both cases was the confidentiality of the knowledge and the subsequent assumptions made about the credibility of Ngarrindjeri women and Yawuru men. In two equally long-winded and procedurally focused judgments, two different Federal Court judges decided that the developers had been denied procedural fairness and quashed the protection orders made.

It is at this point that the histories of these two claims part company. While the matter of the 'Crocodile Park' was laid to rest, albeit with an unsatisfactory outcome for the Yawuru men, the Hindmarsh Island case entered a new stage. As the media whipped itself into a frenzy about the 'women's business', the South Australian Premier called for a Royal Commission and the Federal Government announced that it would also conduct an 'inquiry' into the matter. The terms of reference of the South Australian Royal Commission were to inquire into the following matters:

1. Whether the 'women's business', or any aspect of the 'women's business' was a fabrication and if so
   (a) the circumstances relating to such a fabrication;
   (b) the extent of such fabrication; and
   (c) the purpose of such a fabrication.[57]

The Ngarrindjeri women were unable to get an interlocutory injunction to halt the establishment of the Royal Commission and the Supreme Court found that the public interest in having the Commission give its report by the due date overrode their rights as private citizens. In December 1995, the South Australian Royal Commission found that the Ngarrindjeri women's claims had been fabricated and that the way should be cleared for the bridge to proceed. The High Court, in September 1996, ruled that the Federal Inquiry into the Hindmarsh Island affair conducted by Justice Jane Matthews, was unconstitutional and that the conclusions reached by that inquiry were not to be released. The report was, however, tabled in the senate by the new Federal Minister for Aboriginal Affairs, John Herron. Senator Herron then called for special legislation to be drafted to allow the bridge to be built without a further inquiry under the *Heritage Act*. In a curious twist, Kim Beazley, the leader of the Labor Party, pledged his support for the government's push to proceed with the bridge and stated that the former Labor government's opposition to the bridge was based on "no information at all".[58]

As Parliament engages in a heated debate over the legitimacy of introducing special legislation to enable construction of the bridge in light of its obligations under the *Racial Discrimination Act* 1975 (Cth), the story continues to unfold.

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56 *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* note 18 *supra* at 9-13 for claims and counter-claims; *Chapman v Tickner* note 18 *supra* at 95, 99-102

57 *ALRM v South Australia* note 8 *supra* at 8, per Debelle J

58 J Brough, "Labor Admits Error in Blocking Bridge", *Sydney Morning Herald*, 24 September 1996, p 8.

Importantly, the right to 'tell' the tale of Hindmarsh Island has now been removed from the hands of those originally authorised to tell it, the Ngarrindjeri women. This 'spiritual dispossession' was, in large part, achieved through the workings of the truth/knowledge hierarchy[59] implicit in the judicial review of administrative decision-making as it is currently structured. The Federal review of the *Heritage Act*, while providing a valuable critique of the procedural aspects of the Act, has done no more than analyse its provisions within the existing epistemological framework of administrative law.[60] It will be argued here that a more fundamental and radical reformulation is required, one which will examine the very basis and standpoint from which decisions about the value or credibility of particular forms of knowledge are made.

The controversy which has surrounded the spiritual life of the Ngarrindjeri women could be explained in many ways. The fact that Aboriginal knowledge, and particularly the knowledge of Aboriginal women, has been regarded as public property is one explanation. Another explanation relates to concepts of credibility and knowledge and the cultural 'invisibility' of Aboriginal women discussed above. It will be argued later in more detail that Aboriginal women are at the bottom of the hierarchies of 'credibility' and 'truth' which have been created through legal and political rhetoric. The fact that the South Australian Royal Commission was founded on the basis that the women's claims were fabricated is an example of the way in which assumptions about Aboriginal women and their credibility become embedded within legal doctrine. The Commission proceeded with its inquiry, despite the fact that it was recognised that even if the claims were not fabricated, the opening up of this sacred knowledge to public scrutiny would, in all probability, lead to its destruction.[61]

The lack of understanding of the nature of the spiritual beliefs of Aboriginal people is also revealed in the comments of Debelle J who stated that:

> I accept that the mere fact that the Royal Commission exists may cause distress to the Ngarrindjeri women but the fact of the inquiry does not inhibit their capacity to practise their religion.[62]

The low value accorded to the religious beliefs of Aboriginal women could provide another explanation for the 'trumping' of these beliefs by the interests of 'the public'.

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59 The idea of a hierarchy of knowledge (and therefore 'truth') was discussed extensively by Michel Foucault in his work, particularly in 'Two Lectures', in C Gordon (ed), *Power/Knowledge*, Harvester Press (1980) This idea will be discussed in more detail below.

60 *ABC Law Report*, Radio 2BL, 26 March 1996. In an interview with Elizabeth Evatt she stressed that the focus of the Act should be recast in more 'culturally appropriate' terms and that negotiation and mediation should occur in order to avert conflicts. It was not, however, suggested by Justice Evatt that the conceptual framework of administrative decision-making be revamped.

61 This point was more fully explored in the outcome of the *Crocodile Park* case where the full Federal Court decided that the decision-making and consultative processes established under the *Heritage Act* made it impossible to guarantee that information provided during the reporting process would remain confidential: *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 49 FCR 507.

62 Note 8 *supra* at 11, per Debelle J.

IV. 'WHAT CAN SHE KNOW?':[63] EPISTEMOLOGY, CREDIBILITY AND THE TRUTH OF THE MATTER

> [A woman] does not want the truth; what is truth to women? From the beginning, nothing has been more alien, repugnant and hostile to woman than the truth.[64]

The way in which we 'know' things and the weighting which has traditionally been given to particular types of knowledge has received a huge amount of attention in both feminist and postmodern texts.[65] These writers have deconstructed the history of concepts such as 'reason', 'truth' and 'knowledge'[66] and have generally concluded that, far from being 'apolitical' or 'universal' ideas, these are philosophical constructs deeply embedded within the politics of power. Michel Foucault, in particular, has described the conjunction between 'knowledge' and 'power' and the way in which certain knowledges become 'subjugated' or 'disqualified' by virtue of their lack of 'scientificity', thereby creating a 'hierarchy' of knowledges.[67]

The issues of 'credibility', of 'truth' and the value which is attached to particular forms of knowledge must be central to any analysis of the legal treatment of Aboriginal heritage claims. These standards of credibility or truth are both sexist and racist in the way that they are structured as well as in the way that they are applied. As anthropologist Deane Fergie noted:

> ... only one people's credibility is being questioned: 'Who's asking about the credibility of the developers or the politicians? Nobody? I feel thoroughly ashamed with the way my people have been so eager to believe a story about fabrication - a story which doesn't stand up to any scrutiny of the chronology of events.'[68]

A. A 'Credible Witness'?

Assumptions about the nature of 'Aboriginality' or 'femininity' are brought to bear in any assessment of the credibility of Aboriginal women. These presumptions often serve as a double-edged sword for Aboriginal women, who are either deemed 'Aboriginal' and thereby subjected to all of the prejudices inherent in such an ascription, or punished for their failure to be 'traditional' enough.

The very concept of 'Aboriginality' is one which has largely been constructed and defined by non-Aboriginal people. Marcia Langton has described the way in

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63 L Code, *What Can She Know: Feminist Theory and the Construction of Knowledge*, Cornell University Press (1991).

64 F Nietzsche, *Beyond Good and Evil*, Vintage Books (1989) at [163].

65 See for example M Foucault, note 14 *supra*; JP Sartre, *Being and Nothingness*, Methuen (1969), G Lloyd, "History of Philosophy and the Critique of Reason" (1984) 1 *Critical Philosophy* 5; S Harding and MB Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science*, D Reidel (1983); M Gatens, "Feminism and Philosophy or Riddles Without Answers" in C Pateman and E Gross (eds), *Feminist Challenges*, Allen & Unwin (1986) 13

66 See Elizabeth Grosz's discussion of the basis of the Aristotelian and Platonic ideas of 'reason', 'rationality' and 'knowledge' in S Gunow (ed), *Feminist Knowledge: Critique and Construct*, Routledge (1990) 147.

67 M Foucault, "Two Lectures", note 59 *supra*

68 Dr Deane Fergie quoted in B Collis, "Bridge Over Troubled Waters', *The Age*, 25 May 1995, p 15.

which Aboriginal people have been represented in Australian popular culture as 'liars, cheats and drunks'.[69] Related to these stereotypes of Aboriginals, have been a number of gendered and racist representations of Aboriginal women who have been portrayed as immoral and promiscuous or, alternatively, as overly-assertive black matriarchs.[70] The belief in the innately opportunistic or deceptive nature of Aboriginal people has been particularly apparent in heritage claims where it is assumed that a lack of public knowledge about a site prior to a development application being lodged means that the claim has been fabricated in order to stymie the developers.[71] Alongside this host of negative cultural representations of Aboriginality exist another set of stereotypes about 'traditional Aboriginal culture' steeped in a western-defined notion of authenticity 'which is frozen in time and space'.[72]

The credibility of women both within and outside the legal system has also been the subject of stereotyping and definitions based upon negative cultural assumptions. The wholesale and continued acceptance in legal doctrine of (now unfashionable) Freudian psychological theories, which positioned women as irrational, childlike, hysterical and untrustworthy has meant that women have rarely been regarded as authoritative or reliable.[73] This assumption was played out in an interesting 'sub-plot' within the Hindmarsh Island saga whereby the credibility of both the women engaged to report on the Ngarrindjeri claim was impugned.[74] As Debra Jopson has argued, the first step taken in this case was to undermine the credibility of the Ngarrindjeri women and the 'next logical step was to question 'feminist' anthropology itself'.[75]

Aboriginal women who fall into both (and neither) of these categories of unreliability have been considered to be 'doubly incredible' in legal discourse.[76]

It is a paradox then, that within both feminist and critical race theory, the standpoint of the 'subaltern' or the woman of colour has been regarded as 'visionary' and more credible than those who oppress:

> Those who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom - adopting the perspective of those who have seen and felt the falsity of the liberal promise - can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.[77]

Importantly, the power attributed to the 'subaltern' within the ranks of postmodern academia has not translated itself into increased political, legal or social power for those people who have experienced the workings of numerous interconnected and overlapping oppressions. The system of administrative law in Australia, as demonstrated here, will give far less authoritative weight to the

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69 M Langton, note 14 *supra*

70 J Pettman, note 28 *supra*, pp 27, 65.

71 J Jacobs, note 54 *supra* at 312

72 C Cunneen, "Judicial Racism"(1992) 59(2) *ALB* 9 at 10

73 E Grosz, note 66 supra, pp 151-6.

74 *Cf* discussion by O'Loughlin J of allegations made against Cheryl Saunders in *Chapman v Tickner* note 18 *supra* at 57.

75 D Jopson, "Old Prejudices Alive and Kicking", *Sydney Morning Herald*, 1 June 1995, p 15.

76 J Stubbs and J Tolmie, note 5 *supra*, P Hill Collins, note 40 *supra*, pp 221-38

77 P Cheah, "Stagings of the Margin: The Limits of Critical Race Theory" (1994) 2 *Australian Feminist Law Journal* at 33.

experiences of those who, by virtue of their epistemological 'difference', cannot couch their claims within the parameters of the kind of 'knowledge' which it can recognise and understand.

B. Expert Knowledges and Hierarchies of Truth

Closely related to the concept of credibility is the idea that some knowledges are intrinsically more valuable and authoritative than others.[78] The discussion above has examined the way in which Aboriginal knowledges have generally been trivialised and devalued within Anglo-Australian culture. The lack of value accorded to Aboriginal spiritual beliefs is partly due to their inability to be 'proved' through the processes of 'objective' and 'rational' 'inquiry'. As Aden Ridgeway, head of the New South Wales Aboriginal Land Council, has stated: "It is a characteristic of Western society to demand to know everything there is to know about everything".[79] In this scheme or 'hierarchy' of knowledge, that which is 'undiscoverable' becomes inherently less valuable. This is what Lorraine Code has described as the distinction between 'knowledge' and 'experience'. While 'knowledge'(which is 'masculine' in character) becomes privileged, 'experience', (which is identified with women), is found to be lacking in probative weight.[80] This process has been described by Jocelynne Scutt:

> In the white legal system, women are unlikely to be seen as knowledgeable about our own culture. We are hardly likely to be seen as 'landowners', 'business leaders', bearers of (worthwhile and significant) traditions. In the dominant culture, white women are unlikely to be acknowledged as the 'great' writers, painters, story tellers, playwrights, poets. It is therefore hardly surprising if Aboriginal women's views and realities are less likely to be taken into account.[81]

The gendered division of 'knowledge' and 'experience' has meant that in a legal setting, the testimony of men, which is usually framed in the 'objective, rational' terms required of 'true knowledge' is given credence over that of women. In the Hindmarsh Island case, the probative value of the affidavit tendered by Allan Campell and the evidence brought of Doug Milera's allegations of fabrication was considered to be very high.[82] These Aboriginal men, therefore, whilst generally not being granted the same status in terms of 'believability' as white men or even white women, were deemed to be more 'truthful' than the Ngarrindjeri women.[83]

The rung above 'white men' on the knowledge and credibility ladder is occupied by the 'experts'. The determinative role played by anthropologists in

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78 S Gunow, note 66 *supra*, pp 22-3

79 Aden Ridgeway quoted in D Jopson, note 75 *supra*.

80 L Code, note 63 *supra*

81 JA Scutt, note 9 *supra* at 5.

82 *Chapman v Tickner* note 18 *supra* at 20, 22, 32. *ALRM v South Australia* note 8 *supra* at 10, per Debelle J Importantly, it has subsequently been revealed that Doug Milera, whose story of fabrication was seized upon as "the truth" by sections of the media, told his story whilst intoxicated, to a journalist who had offered to provide him with a bed for the night as well as free food and alcohol.

83 P Brock, note 42 *supra*, p xxii where she documents several instances of Aboriginal men asserting their interests over the interests of Aboriginal women within the land rights context This does not mean that such relationships function in a simple or hierarchical manner It is, as mentioned previously, a dynamic and fluid relationship of subordination and domination.

deciding whose knowledges and practices were valuable enough, or visible enough, to be recorded and preserved has been discussed earlier. The evidence tendered by these experts in court has also been given great weight so that, to a certain extent, the 'expert' becomes more knowing than those who have divulged their knowledge to them for study:

> The commission has tried to be sensitive to Aboriginal law. It regularly goes into secret session. But Mrs Rhonda Agius claims that this has meant non-Aboriginal lawyers and journalists stay, while Ngarrindjeri women whose secrets are being discussed are excluded.[84]

V. CONCLUSION

The belief that Aboriginal knowledge is 'public property' and the reification of the procedural aspects of law have actively worked against the interests of Aboriginal people in the protection of their sacred sites. Aboriginal women in heritage claims have become the victims of 'single axis thinking'. The same colonial processes which have left women such as the Ngarrindjeri most vulnerable to 'spiritual dispossession' have been reinvented in order to deny the legitimacy of their claims. The uncertainties and contradictions surrounding the 'women's business' in this case have been used as 'proof' that the women are lying, rather than as proof of the dislocating effect of colonisation on such knowledges. The adoption of the Anglo-Australian patriarchal model of gender relations by Aboriginal communities has also meant that Aboriginal men will, at certain times, actively oppose the interests of Aboriginal women in preserving their sacred beliefs. The claims of the Ngarrindjeri women in relation to Hindmarsh Island have been rendered illegitimate through socially constructed definitions of 'credibility' and the workings of a truth/knowledge hierarchy which devalues the kind of knowledge that these women are asserting. In order to encompass the knowledge and the experiences of Aboriginal women, the current paradigm of administrative law needs to be reconceptualised along the lines proposed by Donna Haraway:

> I am arguing for politics and epistemologies of location, positioning and situating, where partiality and not universality is the condition of being heard to make rational knowledge claims. These are claims on people's lives; the view from a body, versus the view from above ...[85]

84 D Jopson, note 50 *supra*

85 D Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature*, Free Association Books (1991) p 195.

APPENDIX

A BRIEF CHRONOLOGY OF THE HINDMASH ISLAND AFFAIR

1988: Archaelogical report documents existence of specific sites of importance to Ngarrindjeri people in the area.

1989: Binalong Pty Ltd lodges a development application for a major program of resort construction on Hindmarsh Island. The proposal includes a bridge linking the island to the mainland. After seeking anthropological reports and environmental impact statements, the State Labor Government agrees not only to allowing the project to go ahead but also to contribute to the cost of constructing the bridge.

December 1993: Protests at the bridge site by Aboriginal and non-Aboriginal residents concerned at the impact of the bridge. The Lower Murray Aboriginal Heritage Committee and the Aboriginal Legal Rights Movement (ALRM) express their concerns about the bridge in a letter to Robert Tickner, the Federal Minister for Aboriginal Affairs.

January 1994: The newly elected Liberal Government in South Australia, after seeking legal advice, finds that it is bound by the agreements made by the former government. A further anthropological report prepared by Dr Neale Draper confirms the existence of significant Aboriginal sites on both sides of the area adjacent to the proposed bridge. The State Government holds that these discoveries are insufficient to halt construction.

April 1994: The ALRM again writes to Robert Tickner seeking an emergency declaration over the site under the *Heritage Act*, s 9.

12 May 1994: Robert Tickner makes the *s 9 declaration* halting construction for 30 days while waiting to receive and consider a report in order to assess whether a permanent protection order should be placed over the site.

9 June 1994: The *s 9 declaration* is extended for a further 30 days. During this time, Professor Cheryl Saunders prepares a report pursuant to s 10(4) of the Act. Her report contains the first documented evidence of the 'women's business'.

9 July 1994: Based on the report by Professor Saunders, Robert Tickner makes a declaration under s 10 of the *Heritage Act* prohibiting the bridge construction for 25 years. During the reporting process, confidential information is accidentally sent from Tickner's office to the office of the opposition Minister Mr Ian McLachlan. Mr McLachlan resigns from cabinet after it is discovered that he has read the secret documents.

15 February 1995: Federal Court judge Justice O'Loughlin hands down the decision in the administrative challenge brought by the developers, Binalong Pty Ltd. On the grounds that the developers had been denied procedural fairness because the Minister had failed to 'consider' the report

of Professor Saunders, the ministerial order made under s 10 is quashed: *Chapman v Tickner* (1995) 133 ALR 74.

5 June 1995: Doug Milera appears on television claiming to have been part of the 'fabrication' of the Hindmarsh Island women's business.

16 June 1995: The South Australian Government establishes a Royal Commission, headed by Iris Stevens, to enquire 'whether the women's business' was a fabrication.

26 July 1995: Decision in *ALRM v South Australia* [note 8 *supra*] handed down - Supreme Court's denial of an injunction to stop the South Australian Royal Commission.

8 December 1995: Full Federal Court confirms the decision of O'Loughlin J and upholds the quashing of the ministerial order banning the bridge construction: *Tickner v Chapman* (1995) 133 ALR 226.

21 December 1995: South Australian Royal Commissioner Iris Stevens reports that the Ngarrindjeri women's claim had been fabricated: 'to prevent the construction of a bridge between Goolwa and Hindmarsh Island'.

January 1996: Justice Jane Matthews begins the Federal Government's inquiry into the Hindmarsh Island (Kumarangk) affair.

16 January 1996: Announcement that Justice Elizabeth Evatt is to conduct a review of the *Heritage Act*.

19 February 1996: Binalong lodge $12 million compensation claim against the Minister in the Federal Court.

6 September 1996: High Court finds Justice Matthews appointment unconstitutional: *Wilson v Minister of Aboriginal and Torres Strait Islander Affairs* (A49/1996: 13 February 1997).

17 September 1996: Federal Inquiry into the Hindmarsh Island affair tabled in the senate by the Minister, Senator John Herron.

17 October 1996: Hindmarsh Island Bridge Bill 1996 (Cth) introduced. The specific purpose of the Bill is to prevent a declaration being made under the *Heritage Act*.