



Raw Law: The Coming of the Muldarbi and the Path to its Demise

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In writing this thesis I have engaged in a personal struggle to decolonise myself, so it is written in a style which is part of that ongoing process of decolonisation, it is a writing of a song that still sings within. A song circles, so does the written form it does not always follow the rules of grammar or 'normal' academic structure, although I would argue the ideas and arguments are there, they are just positioned differently.

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This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

The thesis includes parts of the following articles, which were written solely by me during the period of the candidature:

'The Power of Muldarbi and the road to its demise', (1998) 11 *Australian Feminist Law Journal* 28

'Naked people's rules and regulations', (1998) 4 *Law Text and Culture* 1

'Indigenous Peoples' Law Ways: survival against the colonial state, (1997) 8 *The Australian Feminist Law Journal* 39

I have also submitted the following article and at the time of writing I was still awaiting the referees report, 'Kaldowinyeri' (1999) 3 *Flinders Journal of Law Reform*.

I consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying.

Irene Watson
May 1999

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The writing of this thesis has been difficult because I have lived the process that I write about. During the writing of the thesis many events and issues continued to draw me away from the focussed process of writing. At the time the diversions were stressful, but now when I look back I see how they have enriched and become a valuable part of the thesis. I found myself constantly weaving this material into the thesis as it grew. For all of those diversions I am thankful to all of their initiators.

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ABSTRACT

This thesis is about the origins and original intentions of law; that which I call raw law. Law emanates from Kaldowinyeri, that is the beginning of time itself. Law first took form in song. In this thesis I argue that the law is naked like the land and its peoples, and is distinguished from that known as law by the colonists, which is a layered system of rules and regulations, an imposing one which buries the essence and nature of law.

The thesis is a writing from 'inside', it is from my Nunga - Aboriginal -perspective that I write. In writing this thesis I have engaged in a personal struggle to decolonise. The thesis is written in a style which is part of that ongoing process of decolonisation. It is a writing of a song that still sings within.

I write about nakedness, of naked law, land and people. The loss of nakedness and the clothing of the body, where dress was imposed by force and domination, is the movement away from being naked in body and in law. Terra nullius of the land, law and people, is what the coloniser clothed the land and its peoples in.

Law has a dimension which is spiritual; we believe that we are descended from beings of the dreaming. They are called ngaitji or totems. The ngaitji represent our spiritual attachment to our ancestral beings. Our ngaitji teaches us about the unity we share with all things in the natural world. That is law. The spiritual relationship we have with the natural world is one which is in opposition to a western perspective of the natural world being like a supermarket where all things become a commodity for use and consumption. The colonists have no concept of the natural world as a relation. The use the land as a commodity has the same meaning to us as the consumption of one's mother.

I write about the historical and contemporary faces of the muldarbi and its past and continuing policies of genocide against indigenous peoples. I also discuss how the mainstream in Australia cannot see the muldarbi behind the masks it wears. The masks are many; some of them are protection, assimilation, native title, cultural rights, and international laws. Native title is a muldarbi because it is a killer of raw law. Native title is 'known' to recognise indigenous rights to land, but it is an illusion. Instead, it will open our lands to further rape of their natural resources.

In this thesis I explore the availability of space away from the genocide, and the possibility of re-establishing an indigenous horizon. In finding that space I journey through the trauma of all peoples to include those who call themselves non-indigenous; I look at issues of co-existence, treaties, and international law, and its development of an indigenous rights discourse, and how it is we can travel a path of peaceful co-existence.

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Chapter 1

KALDOWINYERI - MUNAINTYA ¹

1.1. IN THE BEGINNING²

Kaldowinyeri: a time when the first pekere tunjar³ were sung, first dreams were dreamed, first visions, thoughts and ideas took form. The tunjari⁴ sang the beginning of law itself. Law began in Kaldowinyeri, coming out of the creation. Creation of the first sunrise, and first songs. In the beginning law was naked or 'raw', naked like the land and its peoples. Law emanates from a place of rawness and truth. In nakedness it is without facade, the truth is laid bare.

The country of my mother's grandmother's, the Coorong, is ruwe of the Tanganekald, peoples this tunjari sung the arrival of the ancestors:

Guru'nulun 'and 'wardand 'wanunj ganji
'goronjkanjal 'lei a' meinjg 'nainj'gara'nal
'guru'nulun 'and 'wardand 'terto:'lin
(h')end 'barum ai! 'walanjala talanja'leir
r'einamb 'maranj'gara'nal .⁵

¹ Kaldowinyeri means a long time ago, the beginning of time itself, the time of creation. The word comes from the language of the peoples of the Lakes and Coorong region, known as "Ngarrindjeri". Ngarrindjeri is a group that evolved from the Pt McLeay mission life, and is made up of the following language groups, the Yardi, Tanganekald, Ramindjeri and others. The word Munaintya is a Kaurna word it has the same meaning as Kaldowinyeri. I refer to these language groups throughout my thesis as I have kinship relationships to all of them.

² I have used the term 'in the beginning' in preference to what is normally used at this point in a thesis, 'introduction'.

³ Means creation song in the language of the Tanganekald.

⁴ Means song.

⁵ This song is sung by Milerum and was recorded by Tindale, Norman, 1937:108-109.

The song sang our beginnings, when the ancestors travelling from the north coming closer to the Coorong and the sea heard the crashing sound of the ocean, it made them frightened, they stood still, some wanted to return to the north, but they agreed to stay and settle down. One of the people called out Tanjo'walo'njan, 'what will you do now?'. The name of the Tangane or Tanganekald was created from this call.

Our beginnings come out of Kaldowinyeri, a concept that is difficult for Nungas to translate into the languages and thinking of non-Aboriginal peoples. It was a creative time where law and its songs or stories were birthed. It birthed laws that are unchanging laws that were given to our ancestors for us to live by. Our laws were born as were the ancestors - out of the land. We didn't travel across a land bridge from somewhere else, our songs and stories record our beginnings and our birth connections to our homelands, to country now known of as Australia.

we have been there since the beginning of time. Our history tells us we've been there since the beginning of time. They will try and tell you that we came across a land bridge because it suits their purposes. We know our history. We don't have to be told. We know that the Creator placed us where we are.⁶

⁶ The evidence of the Haida elder, Lavina White is referred to throughout my thesis to illustrate ideas that are shared by indigenous peoples throughout the world. As the Haida suffer the Bering Strait theory of western scientists and academic institutions as an explanation of their origins and coming to place. We also suffer a similar theory, that is we are seen to have come to Australia crossing the Torres Strait. White, Lavina, giving evidence before the *First Nations International Court of Justice*, (FNICJ) Transcript 1996, Vol 2:84. For a further discussion on the Bering Strait theory see Churchill, Ward, 1995:265.

Raw law is unlike the imposed colonial legal system.⁷ It is unclothed of rules and regulations. The law was created raw like the land and the people. Our laws were birthed by the creation, and like the birthing of people, the law was born naked. All law was at Kaldowinyeri naked, and is filled with the spirit of creation. The law is for the peoples to know and to live by as the ancestors had, from Kaldowinyeri. The raw law is not imposed, it is lived as a way of life:

Your language is very difficult for me to speak about some things, because law is not the way we view it. We view it as a way of life.⁸

Law is lived in life, the will to live in the law are one. Unlike today. Today in the modern world the will to live in a place of lawfulness is lost to the greater humanity. Evidence of this is found in the growing list of global crisis, poverty, environmental disasters, famine, war, and violence. What the greater humanity have come to know as 'law' is a complex maze of rules and regulations; the body of law is buried, barely breathing.

Law come to us in a song, it was sung with the rising of the sun, law was sung in the walking of the mother earth, law inheres in all things, it is alive, in all things.⁹

⁷ White, Lavina, FNICJ 1996, Transcript, Vol. 2:68 describes the colonial government of Canada as 'a foreign government that has been imposed on us'. Throughout my thesis I refer to the colonisers' laws as being the muldarbi, I also use it to describe other processes that are destructive and killing of raw law. Muldarbi means the demon spirit.

⁸ White, Lavina, FNICJ 1996, Vol 2:83

⁹ A view that is not readily shared by some non-indigenous 'experts' who prefer instead to contain the idea of a relationship of song to land to the 'western dessert Aboriginal cultures'. This is based on their findings that there are no records of song law in the south east of Australia. Phillip Jones when he gave evidence to the *Royal Commission into Hindmarsh Island, 1996*, Transcript p 4257, an inquiry that I speak about in more detail in chapter 5 of this thesis, disputes the existence of song law in the Lower Murray regions. He draws a distinction between the western dessert and south eastern Aboriginal cultures. He draws this distinction based on his understanding of our religious and spiritual beliefs ideas that he has drawn from information that was gathered by the missionary Taplin who worked at Pt

Before the coming of the muldarbi¹⁰ to our ruwe¹¹ the law was held in the song, it was known through the song and the ruwe, and the story holder. The law is not written down; knowledge of the law comes through the living of it. The law is lived, sung danced, painted, eaten, walked upon, loved. All of these things. Law was not imposed, and those who lived outside the law did just that, they were in exile from the law. We could say the greater proportion of humanity now lives in exile from the law.

There is conflict between our law and the imposed colonial legal system. Our old people have struggled against the imposed system, to keep the vision of our law alive for future generations:

The laws of our people, our highest laws of respect and consent seems to be a commonality of all the First People of this side of the world. And the more I hear from other people, I realize that we must come together to be able to gain our freedom that I remember. I'm old enough to remember what it was like to be free. And at this moment I wish that I was speaking to you from one of our beautiful beaches.¹²

McLeay during 1860-1880. Taplin saw his own God in the face of Ngarrindjeri and all else become demonised vanished from the recordings of the colonist, we become more like them and less like our sisters and brothers in the western dessert in their eyes anyway. They said we had no song laws in their inquiry into our spirituality and in their judgement they failed to see the women in our landscape: the sisters running from Ngurrunderi, the Seven Sisters of the Lakes, Prupi old woman of the Coorong, the spider huntswoman the creator of our language and others. They are our songs they are also the feminine and the natural world that sings in our ruwe, the snake, the thukabi (turtle) the kondoli (whale) the krowli (blue heron) tjirbruksi (ibis) and warki (crow) it goes on. These stories still live in spite of the genocide. This inquiry was established by the state government of South Australia to determine the issue of whether or not Nunga women had fabricated secret sacred women's business for the purpose of preventing the building of a proposed bridge from the mainland to the island. This inquiry is further critiqued in chapters 4 and 5.

¹⁰ Means demon spirit

¹¹ Means land

¹² White, Lavina, FNICJ Transcript Vol 2 1996:72.

Raw law, Nungas¹³ law, is unlike others (that are known as law). The law is in all things, it emanates love, caring and sharing, respect for all things. That is how we kept the land in such a pristine state. The natural world was un-developed, not because of an inability to transform the mother, the ruwe - that is the land - but because of a love and reverence for all things in the natural world. In Chapter 2, I discuss the idea of raw law further.

And as the law was raw so were its people. My ancestors were naked people. From birth until death they lived naked and in death our naked bodies were rolled in a woven grass mat, smoked and later buried. Only the skull of the ancestor was retained for the living to drink the water of life from.¹⁴ Many of us are still naked, not physically, but we are naked in another sense. We are undressed of many things that now in this modern Christian world have encased our being, our soul, so that many no longer know who they are.

In chapter 3 I write about nakedness, the naked law, land and people. It is in nakedness and the rawness of law that we are truly lawful. It is here that we move from the beginning to the present, as the impact of colonialism¹⁵ is realised. The loss

¹³ Means Aboriginal person, used in the southern areas of South Australia, I use this word throughout my thesis, along with other words of the same meaning, for example Ngarrindjeri, Koori, Koorie, Murri, Nyungar. I use the term Nunga broadly in the same sense that I would use the word Aboriginal.

¹⁴ My ancestors the Tanganekald kept the skulls of their dead for use as drinking vessels.

¹⁵ Throughout the thesis I use the term colonialism, I argue that our position has not shifted from the time of Cook and the beginning of our colonised existence. We have not entered a post-colonial phase in our history, our relationship to the colonial state has remained subjugated to and dominated by the colonial state. While I acknowledge the relationship between colonialism to imperialism and the emergence of capitalism, the use of the term colonialism is preferred, I argue it is the same muldarbi, one that is more easily located when it has kept its original name. When there is a change of name it begins to lose its meaning as a prevailing dominant and continuing force, one that has not ended and become post, but one that is still growing and still killing with the same force that it carried in 1788 when Cook invaded our shores. I understand that the term post-colonial is used also to illustrate conditions that arise out of colonialism, it does not however speak to my perspective one that lives within the container of colonialism. One that is too close to be named post. Also the distinction

of nakedness, the clothing of the body, is the movement away from being naked. In chapter 3 I will look at what it is to be naked in the law, and the impact of clothing and the clothing of the law. A place where dress was imposed by force and domination. What happened to the relationship with the raw law when one dressed in the clothing of the coloniser? In dressing in the cloth of the coloniser, to no longer be the naked people, they become what? They become the uncivilised on the path to civilisation. And what happens to the essence of who we are, the naked self? Are we still naked under the layers of cloth? Does the law maintain its naked self under the layers of rules and regulations?

Terra nullius, of the land, law and people, is what the coloniser cloaked all things in. Our very nakedness led them to not see us, to not know us, and in doing this they forgot themselves as naked beings in the creation. The law become covered, barely alive under the layers of killing rules and regulations I discuss the genocidal processes of the muldarbi in chapter 5.

In the christian story, of the garden of Eden, Adam and Eve come to know their naked self when they ate the apple from the Tree of Knowledge. In becoming aware of their own nakedness, they were no longer in the garden, the oneness or nakedness of the creation. The awareness of being naked made them separate and apart from all other things in the garden. They were ordered to go forth by god from the garden of Eden, they left the natural world behind. A break with creation leading the way for 'man' to go forth multiply and dominate the earth. To become one again with all things, do

between minority and Nunga, it is commonly argued that minority groups have cultural rights but no political or territorial rights. Whereas Nungas would argue we have all of those rights. Indigenous peoples become minorities because of our histories of colonialism. If our colonial histories are forgotten there becomes little that distinguishes us. See Sanders, D, 1993:75, for further discussion.

they learn to unknow their naked self so as to return to their indigenous identity, one they left in their garden of Eden?

In chapter 6 I look further at the enemy of raw law, and the women who call themselves allies. In looking at the muldarbi I speak of the medicine that will work in dissolving the power of muldarbi.

1.2 We are the natural world it talks to us

The ancestors, both human and animal, are our relations and connect us to law and Kaldowinyeri. A relationship, which links us to the past, is a connection that is lived in the present, to be re-created in the future. This is the cycle of our ancestors, it is their path or journey, and we continue that walk from Kaldowinyeri. The Seven Sisters' story song and inma¹⁶ lives in the land and lives of the women, who still know the ancestors, we are always talking with them, even though they live in the constellation of stars known as the Pleiades.

..the Seven Sisters, seven planets in the sky that land on earth, leaving seven holes where they touch down. As they set off across the desert, they come to a green tree laden with wild figs, but they do not touch it. They know there is a man in there waiting to grab them-old lover boy, they call him-so they walk past and stop at a funny little tree with no leaves and just a little fruit. The sisters walk past the green grass around a waterhole, stopping instead to drink

from a muddy little puddle of dirty water. The same again when they pass a cool, shady spot to sit under a stunted tree that throws off just a small circle of shade.¹⁷

The ruwe where this part of the Seven Sisters song lives is in a region known as Billa Kallina, a place where the federal government has proposed the development of a nuclear waste depository site. One of the Seven Sisters custodians was reported to have said, 'this is their dreaming story and it is about how life in the desert is hard but sustainable if you are very smart and settle for less.' And right now, pointing angrily to the sky, the Seven Sisters are upset.¹⁸

Nungas believe that we are descended from beings of Kaldowinyeri, they are our ngaitji.¹⁹ And this ngaitji represents our spiritual attachment to ancestral beings. Our ngaitji teaches us about the unity we share with all things in the natural world. 'Cooma el ngruwar, ngruwar el cooma, illa booka mer ley urrie urrie. One is all, all is one, the soul will not die.'²⁰ At Kaldowinyeri the ancestors were both human and

¹⁶ A word used by the Pitjantjatjara meaning ceremony, where the song is sung and danced, a blessing of the earth and participants, a place of exchange with the ancestors and the natural world.

¹⁷ Debelle, Penelope, and Daly, Martin, 28th February 1999:1, 'Are They Trying to Kill Us?' the Age. In the thesis I have avoided including songs and stories that have not been published, because of my commitment to the oral tradition of Nungas. I believe the oral tradition is best supported in the telling of stories through the oral tradition of 'inma' the ceremony itself. The telling of stories out of this context has the potential to erode our ancient law ways. The permission by the custodians Eileen Brown, Mrs Stewart and others to publish this part of the epic journey of the Seven Sisters is not usual practice. But then the world we live in is changing so rapidly the public telling of this story was in response to a proposal to develop a nuclear waste dump on the lands travelled by the seven sisters. It is important to note that law songs or stories are multi-layered, that is they may have a layer that is palya, that means is alright to make it public, but overlays many other layers that are private or secret sacred. So the telling of this story whilst it is now in the public domain, has other layers of knowledge that will remain within the realm secret sacred business of the custodians of the knowledge.

¹⁸ Ibid.

¹⁹ Describes the spiritual relationship we have with the natural world, my people have a relationship with both Tjirbruki, the ibis and Krowli the blue heron. We communicate with the animal and in general the natural world, they tell us things of the spirit realm. Bell, Diane 1998, and Berndt and Berndt 1993, for further discussion on the meaning of ngaitji.

²⁰ Rule, Hugh, and Goodman, Stuart, 1979:10.

animal. The relationship between humans, animals and the natural world is known as our ngaitje, or our ngaitje relationship. This relationship tells us who we are, and what our relationship is to the natural world. From our ngaitje we learn about the interconnectedness of all life and are reminded that humanity is just a small part of the overall fabric of life.

The ngaitje relationship determines the inter-relationships between human and other natural forms. Humanity's relationship to the natural world is brought to our awareness through our creation songs Tjirbruki is one song of the Kaurna that has survived the genocide.²¹ I speak more on Nunga identity and the muldarbi that is constantly waiting to subvert our Nunga way of being in chapter 4.

To own the land is a remote idea. The indigenous relationship to ruwe, the land is more complex. In western capitalist thought, ruwe becomes known as property, a consumable which can be traded or sold. We live as a part of the natural world; we are it also. The natural world is our mirror. We take no more than necessary to sustain life; we nurture ruwe as we do our self, for we are one. Westerners live on the land taking more than needed, depleting ruwe and depleting self. So self can be no more tomorrow. Westerners are separate and alien to ruwe and then unable to understand how it is we communicate with the natural world. We are talking to relations and our family, for we are one. When traditional custodians and or owners approach country they will talk to the spirit ancestor, the paininggianna²² of the place. They will tell them who they are and also whom they may have brought with them to

²¹The story of Tjirbruki is told in chapter 7. Tjirbruki is the ibis bird, the Kaurna have a ngaitji relationship, and communication with the ibis.

²² Kaurna word for ancestor the ancient people who first walked the land.

the place.²³ We are always seeking permission from the spirit world for our actions; nothing is assumed. When food is taken from the ruwe thanks are given to the paininggianna, in hope for yellarkari.²⁴

All is one, one is all, we are the land, the land is us, and the law is in all things. That is the law. The following is a poem by Lionel Fogarty speaking of the Nunga in the oneness of creation.

Fellow Being

An' we aborigines in humanity.
The pulses of the red sun give a beat in aboriginal people.
The kissing of winds to trees are the love between aborigines.
Even the water we drink is the pure tears aboriginals share.
We wisely in our humanised aboriginal homes are united under
 all one colour.
The aboriginal is the bread of man's rich land.
We are the rocks of ages and purpling skies.
Look at every scenery in bush you will see an aboriginal face,
 body and spirit.
The aboriginal is not owned by any human being on earth.
Our presence is the flesh of fresh new worlds.
We are music that floats into a wonderful note to all ears.
An aboriginal is nature's soil, you pick it up, hold it in your
 hand and
you will feel our growth in the ground.
We are the gods of man in this land but then we are not
 humans.
Yet we are part of your kind now hey.
The earth above is our spirituals.
And now if you speak our tongue, don't mean you are native,
The sea, hills and lakes are in our hearts and minds.
The universe is belonga to dem big spirit creator.
Oh, now man you go out there to find out more of us, who
 down here
Well listen to that fish talk and you will know we ate it the
 other day.
And if you talk to a bird of paradise you find they are people,
 same with

²³ The Australian, Weekend Magazine, October 10 -11, 1998:42 for further discussion on the relationship of the Karajarri to their country.

²⁴ Kaurna word; meaning tomorrow, on the following day or on a future day.

all creatures here, we aboriginals come from them.
If you feel the heat of the sun, you feel us.
If you see and feel the light of the darkness then you have just
touched an aborigine.²⁵

1.3 Being of cycles

Kaldowinyeri or Munaintya, from the time a long time ago, in the beginning, is also time now, and time into the future. The beginning, present, and future, encircle the place of Kaldowinyeri or Munaintya. The Nunga I am, is unlike the other - the dominant - one which is represented by a straight line of thought - beginning, middle and ending. I write about an indigenous process which encircles, to become one again. One that is non-hierarchical, with no beginning and ending; it is rather a circle, a cycle of continuity of being, becoming another cycle, nurntikki.²⁶ Suzuki writes about cyclical time:

Time in nature is cyclical or cumulative; human time is linear. Because of this contradiction between the recurrence of nature and the finality of our own fate we reach for something eternal, something absolute, unchanging, outside time: the essential me-ness of me, the soul, the spirit. Without water, air, energy, food, without other forms of life and other human beings, we die. But we are just as crucially dependent on the idea of spirit. Without that we are truly doomed, drowned in time and change, forced to watch the gap between *now* and the *end* as it inexorably shrinks. Friends, family, all the joys and beauty of

²⁵ Fogarty, Lionel, 1995:14.

²⁶ Kaurna word, meaning to go on forever.

life are threatened by time and death, and we need spirit to heal that sorrowful knowledge.²⁷

We never left nature time. The old people lived by the seasons and moon cycles. We still do, under the imposition of the clock. The law way of Nungas is not in the past; it is a way of life that is carried with great struggle into the present, and is the way back to the future and Kaldowinyeri.

Irigaray takes a glimpse at this thing we call time;

Attracting me toward, wonder keeps me from taking and assimilating directly to myself. Is wonder the time that is always covered over by the present? The bridge, the stasis, the moment of in-stance? Where I am no longer in the past and not yet in the future.²⁸

The following law-story, 'Waargle', told by the Bibulmun Peoples tells of a past time, Kaldowinyeri, but it is also a time that is present as well as a time that is coming to us in the future.

A long, long time ago, after thousands of years in this land,...tribes were gradually learning to live in harmony, not only with each other, but with the animals, birds, and the entire environment.....between the great Bibulmun people and all other tribes in their region, there were many who chose to ignore the sacred spirit teachings of the great and powerful Bibulmun elders. As the years passed the elders became more and more concerned about the

²⁷ Suzuki, David, 1997:187-188.

²⁸ Irigaray, Luce, 1993:75.

younger people's reluctance to follow the laws and customs which had enabled the tribes to survive and live in harmony for thousands of years.

The young ones openly showed disrespect for the elders and their age-old customs and laws. They abused the old ones and ignored their warnings that the Korrdon Marma Man would surely punish them all. Even the strict rules of marriage were broken. Because of their distrust and jealousy there were many warriors who would not leave their mia-mias to go hunting for food because they had taken their sisters, aunts, second cousins, and nieces as wives and dared not leave them for fear that someone else would claim them.

By this time many of the elders had also forsaken the laws too.....But..... there were seven people, four warriors and three women, who would not accept the way in which the once proud and powerful Bibulmun people were sadly destroying themselves. ...Buerrna (one of the seven) called the three other warriors and the three women to his side and said, 'Last night I dreamed I was riding on the back of Waargle the snake who is the Korrdon Marma Man,As far as I could see there was only water, and as Waargle glided along, floating on the surface of the water were men, women, and children everywhere and they were calling out 'Save me! Save me! Great Korrdon Marma Man,' but as the people came closer, and tried to climb on to Waargle's back he brushed them into swirling water. Suddenly I noticed that you were all riding on Waargle's back with me and we were carried for many days and nights until we reached a sacred rock which Waargle began to circle, and while he did this the water began to go down until the rock was above the

water level and he stopped to allow us to stand on the solid rock. He then said, 'Know your totemic symbol shall always resemble me, the Waargle. Remember the laws...keep this rock sacred, because I will always be here'. The sacred rock is called Boyagin Rock and it is believed the Korrdon Marma Man still sleeps undisturbed inside, in the form of the Waargle, the sacred snake.²⁹

The Waargle speaks of the capacity of the law to transcend human behaviour, its very essence is that it is a spiritual law. The rock is sacred, it is the Waargle, the Waargle is the law. The Waargle law-story tells the people how to live in harmony with the law and of how to avoid breaching marriage and incest laws. A breach of the law results in a breakdown and the people's ability to live in harmony with all things. When the people have broken with the law the survival of humanity is threatened. Our indigenous law-ways are still with us, but they are now subverted by the Australian state. We are like the seven people of the Waargle awaiting the time for the Waargle to rise. We are the animals of Gurukmun's³⁰ time struggling to bring water to the land. We are peoples rising from the ashes of the holocaust: our laws violated, our territories plundered, and our peoples still resisting colonisation, as we face the state.

The thinking of the muldarbi is spreading; its path creating chaos. The muldarbi thought is in one straight line. It no longer has a concept of Kaldowinyeri, nor any thought or idea of how the chaos it is creating will end. The muldarbi is a beast of the now, consuming and killing all, it is a killer of raw law. The muldarbi is amongst us,

²⁹ Bennell, Eddie and Thomas, Anne 1981:44.

it has been imposed upon us, now dominating the planet for centuries. The muldarbi has brought us to a point where we must critically think of a future that appears to disappear before us. At first it appears like no other time we have known before, but the Waargle tells us we have travelled to this muldarbi place before. So the song has already been sung and is singing now.

The ancestors are in a constant state of being, knowing the world as at Kaldowinyeri, being immersed in the law and ceremony of Kaldowinyeri, knowing it in all the places it takes form in the body of law land and peoples. We come back into the future to where we began at Kaldowinyeri, to begin another cycle, and we are met by the ancestors, to begin all over again.

From whence to where are we travelling? Mark Dockstator in his thesis refers to the following Aboriginal teaching, of a Mide Shaman from Minnesota: As you walk down the road of time, do you travel into the past or the future?:

In the beginning, while the races still lived together as one, each of the races had to come to a decision as to what direction he would choose. During this time White Man and Red Man found themselves walking together along the same road. At some point in their journey they came to a division in their path. One of the two possible roads before them offered knowledge and growth through accumulation and mounting of all that could be seen ahead (a one-hundred-and-eighty-degree-vision). This is what White Man chose and he has developed in this 'linear' and accumulative fashion ever since. The other road appeared less attractive materially and quantitatively, but offered a whole

³⁰ I quote the story of Gurukumun further on.

and comprehensive vision that entailed not only vision before but also vision behind (a three-hundred-and sixty-degree-vision). This was a circular vision that sought to perceive and understand the whole nature of an object or event - its physical reality as well as its soul. The Red Man chose this road and he has developed in this circular and holistic way ever since.³¹

Time in western thought goes in one straight line, travelling from a to b. Thinking in terms of space is the movement of persons from a to b. Time in western thought is viewed as existing independent of space.³² From an Aboriginal perspective, time and space are encompassed within a circle. We are always returning to the beginning and are walking into both the future and the past; time and space are encompassed within a circle. And all those who form the circle are one. There is no hierarchy that forms from the circle, and it is unlike christian reference to the idea of god giving man dominion over the natural world. Decision making is consensus - in contrast to the western model of the straight line of majority - minority.³³ And within the circle are all other life forms; there is no hierarchy between humanity and the natural world.

Cycle is a continuum, always, to become another, returning to its beginning, past, future. This process cannot be changed or extinguished, it is the law. It can be extinguished in the minds of humanity but it continues to exist in the reality of our natural world and those who live within it and in accordance with its laws and balances.

³¹ Dockstator, Mark, 1994:25, cites, the philosophy recorded by Dumont, James, 1976:31-32, of a Mide shaman from Minnesota.

³² Einstein's physics shows it not to be, but in the ordinary meaning of western thought the separation occurs. For a further reference see Hawking, Stephen, 1988:151-161.

A Western view is one of progress, of moving forward through the stages of 'civilisation', now in the technological stage. Where to next? As I am writing this thesis the background is filled with talk of colonising Mars and the latest Balkan war. The future from a western perspective is not clear at all. Some predict an ecological disaster, under which model the environment is extinguished, and the first people and all others that follow are extinguished. The question is what survives their idea of extinguishment? If the animals in the following story had been unable to make Gurukmun laugh, what would have survived?

Gurukmun the Frog, comes from Kaldowinyeri, a song of the greedy Frog. The animals deal with the greed in a way which is humane, and they find the medicine to release the trauma that perhaps lies at the heart of greed;

A long time ago, way back in the Dreamtime, there lived a big, big frog, called Gurukmun. He was easily the biggest frog in the whole land, so big that, as he hopped, each hop would make the earth shake. Gurukmun didn't live in a river or creek because there were none big enough, and besides, he liked to hop about on dry land. One very hot day, all the animals were gathered at a waterhole. They were sitting around, chatting about the hot day while the little ones were playing in the water. Then they heard Gurukmun's boolumph! boolumph! boolumph! as he hopped towards the waterhole. The animals watched as he plopped down beside the waterhole and started to drink. And he drank, and he drank, and he drank, until all the water was gone! Where the beautiful waterhole had been, there was nothing but a big muddy patch! Then Gurukmun hopped away to look for another waterhole. One waterhole was

³³ Barsh, Russell, 1993:297-298, argues that in Native American societies, 'There was no notion of 'majority', since the objective was not to find the most popular decision, but the decision that

not enough for a huge frog like Gurukmun. And what's more, he was feeling particularly thirsty. He hopped until he came to a river, and he began to drink. Soon, all the water in the river was gone! Gurukmun rubbed his big green belly. He was still very thirsty, so he hopped down to the ocean, and began to drink. He drank, and he drank, and he drank, slurping up the ocean, and as he drank, his belly grew bigger and bigger and bigger. When all the water in the ocean was gone, Gurukmun was still thirsty! The animals began to worry. Gurukmun was drinking all their water-soon there would be none left. They watched as Gurukmun went from river to lake to waterhole, drinking each one dry. And he didn't stop until all the water in the whole world was gone. All inside his enormous green belly! Then Gurukmun, with all the water in the whole land inside him, hopped slowly up on to the top of an enormous mountain. And there he sat, looking out over the dry brown land. The other animals became very worried. Now they had nothing to drink, and there was no water for the trees and the grass-Gurukmun had taken it all. What were they to do? The Emu and the Goanna went to see wise old Wombat. 'Wombat, there is no water. Gurukmun has it all, and if we don't get it back, then we will all die.' The Wombat called a meeting. All the animals gathered at the bottom of Gurukmun's mountain. The Kookaburra flew up to Gurukmun to ask if he would give some of the water back. But Gurukmun just sat there, big and fat and green. He had all the water, and he wasn't going to part with any of it. How were they going to get the water back? The Possum suggested frightening him. If Gurukmun had a fright, then he might cough some of the water out. But how do you frighten the biggest Frog in all the world? The Goanna thought that if someone could tickle

Gurukmun's nose, then he might sneeze some of the water out. But how were they to reach his nose? It was such a long way up, and anyway, he probably wasn't ticklish. Then the wise old Wombat had an idea. What if we make him laugh? If Gurukmun laughed, then surely all the water would come gushing out. The animals thought about it. It was the best idea, and if they didn't soon do something, they would all shrivel up and die. So it was decided. They would make him laugh. (Following different animals attempts to make the frog laugh finally,)..... It was old Nabunum, the Eel. He wriggled up to the front of the meeting. The Magpies started to giggle. He looked so funny, out on dry land. Nabunum glared at them. 'What do you think is so funny? If someone took away the trees, you wouldn't think it was funny. I'll show you how to make this Frog laugh. And he'll laugh to much, that all the water will come out.' So Nabunum wriggled up to Gurukmun. And he began to dance. He did look silly, an old Eel, wriggling about, trying to dance like the Brolga. Gurukmun looked down at the old Eel. Nabunum was writhing and thrashing, wriggling and crawling, curling and uncurling, twisting in and out and all around himself. Then suddenly he stopped. He was stuck. The animals burst out laughing. The Wombat rolled about in the dust. Old Nabunum, all tied up. It was the funniest thing he had ever seen. Then the animals heard it. A huge gurgling noise. They looked up, and it was Gurukmun. An enormous grin stretched across his big green face. Nabunum struggled to untie himself, and as he struggled, Gurukmun began to laugh in earnest. Great big laughs. And as he laughed, the water started to come from out of his enormous mouth. And Gurukmun laughed so much, that all the water flowed back to fill the oceans and lakes, the rivers and billabongs, the

lagoons and the waterholes. And Gurukmun, the greedy Frog, hopped away and has never been seen again.³⁴

The story of Gurukmun is relevant to our present. The behaviour of Gurukmun is the same as the tyrants who now dominate the planet. Gurukmun could be a transnational mining company, mining for uranium. The mine is in a very fragile area of the state in one of the driest regions of the world. The underground artesian water supplies have been threatened by the mine's vast thirst for water; the water is used to process the minerals and then it is discarded, poisoned, into tailings dams. These dams too pose a threat with the possibility of leakages back into the underground water supplies, which would threaten the survival of future generations to come. How did the community of animals deal with the greed of Gurukmun? They made him laugh. It is a strategy worth considering, because as the animals found, there was no other means available to them that would bring the frog to release the water.³⁵

1.4 Muldarbi the enemy I seek to defeat

For myself the process of writing has been a struggle, a struggle with the muldarbi. The muldarbi has many faces. One of them is colonialism; a muldarbi which still sucks the lifeblood from the land and its people. It is like the tradition of the vampire of Europe. But the muldarbi has other faces too, I deal with some of those in chapters, 3, 5 and 6.

³⁴ Rule, Hugh, and Goodman, Stuart, 1979:25.

³⁵ Irigaray who says ironic mimesis (the poking fun at patriarchy) is the only way to critique it without affirming it.

The muldarbi-colonialism has survived for centuries, always finding contemporary forms to embody itself. Once colonialism was popularised, was seen as good, bringing christianity, civilisation and progress to the world of Nungas. Thus it has claimed legitimacy. Today it finds new ways to feed legitimacy. The muldarbi uses masks, worn to disguise its intentions. Often the muldarbi is disguised in a form that has become popularised. Popularity is important to its survival, increasing also its potency. By being popular the muldarbi is invisible. It is invisible and goes unnoticed as it drains the lifeblood from the land and people. The muldarbi's crime is undetected. In popularising the muldarbi in the minds of the many the people live under the illusion of well being in the lands of the colonised, as the muldarbi sucks silently, invisibly, in the background.

One contemporary face of the muldarbi is the construction of native title by the state and its courts and legislature. The many, or the mainstream majority of people in Australia cannot see the muldarbi behind the mask of native title. Native title is 'known' as being that which will 'save' indigenous peoples from the trauma of terra nullius, (a trauma that has never ended other than in the imaginings of the colonist).

Native title is 'known' as the recognition of indigenous rights to land, and yet behind this mask lies a muldarbi. The illusion of recognition of indigenous rights which I discuss further in chapter 6, is one, that creates a potency which allows victims to be more easily drained of their lifeblood as they are caught unaware. The many are persuaded and programmed to believe that native title will put life back into the land and the people. But it will not.

Native title is a muldarbi because it does not free me to be who I am, a being of law, in chapter 4 I discuss this further. It is the killer of raw law. It continues to dispossess me from myself and the cycles of my being. It is this muldarbi that will legalise the future rape of my 'mother', my ruwe it will make legal the continuity of genocide. The muldarbi undetected hides behind the mask of its own popular face. It makes all legal like the face of the muldarbi before.³⁶ So we have this duality, which spreads its sickness and chaos.

We have been led to believe that the muldarbi is here to protect us, but how can we be protected by a power that subjugates us? So why is it that there are those amongst us who continue to try gaining protection and the recognition of rights from the muldarbi, one which continues to oppress us? Why do they not go outside and reclaim Kaldowinyeri, which is ours that has always been?. Obviously because they cannot see. The medicine of sight is what is needed. In the words of Sheila Rowbotham:

An oppressed group must at once shatter the self-reflecting world which encircles it and, at the same time, project its own image onto history. In order to discover its own identity as distinct from that of the oppressor, it has to become visible to itself. All revolutionary movements create their own way of seeing.³⁷

³⁶ One muldarbi now made unpopular by the High Court decision in *Mabo v Queensland* (1992) 66 ALJR 408, hereafter *Mabo (No 2)* 541 per Deane and Gaudron JJ, is terra nullius, in a ruling of six to one the court held the lands were not terra nullius or 'practically unoccupied' in 1788.

³⁷ Rowbotham, Sheila, cited in MacKinnon, Catharine, 1989:84.

In writing of the muldarbi I expose its identity and that has been a process of exorcism. One which has cleared the path on the journey to self healing. A journey that seeks to decolonise every aspect of the afflicted self. In chapter 7 I look at indigenous ways as being the future and discuss the processes of decolonisation from an indigenous perspective.

1.5 Voice and being a song

Law is of the beginning: of the first songs, sung by the ancestors. When the first steps were walked across the land, country was sung into creation. The land was blessed by law song. Much of what I write about in this thesis that I have called 'raw law' or the 'law', is about a way of living, or law ways. It is difficult to write about 'law' because it is a process that I can't simply describe, as there are no exact definitive examples that translate, particularly into a foreign language which is empty of the ideas that our 'law ways' carry. Our law was not written in the way the west considers equates to writing. Law was however painted in ceremonial design and symbols were marked on boundary markers, identifying traditional owners and their ngaitjes. The difference however between the two is so extensive that there is no basis upon which comparison can be drawn. The idea of 'raw law' comes to me as a way of resolving the problem I had around describing or defining the 'law'. The 'law' is undressed of the layers of rules and regulations modern societies have come to accept in their legal systems. The 'raw law' is the essential basis of law, respect, honour, sharing, caring and love: the essential nature of law which still runs in the law of Nungas, but barely breathing under the layers of rules that cover most other legal

systems of modern states. I refer more to the idea of 'raw law' in the following chapter.

My work is a writing from 'inside', I am of the Tanganekald and Meintangk Peoples, and it is my Nunga position that becomes the place I write from, as I write to regenerate raw law and dismantle the muldarbi law. In writing I have engaged in a personal struggle³⁸ to decolonise myself, so it is written in a style which is part of that ongoing process of decolonisation, it is a writing of a song that still sings within. A song circles, so does this written form, it does not always follow the rules of grammar or 'normal' academic structure, although I would argue the ideas and arguments are there, they are perhaps just positioned differently. To explain further I borrow from the words of Lionel Fogarty, Murri³⁹ performance poet:

In my writing I don't believe in compromise at all. I don't want to be a reconciliation writer or a reformist writer. I like to hit psychological minds and cross boundaries. It doesn't matter if it is in correct grammar or their style of writing.⁴⁰

For me to find law was a struggle, to find a voice that was my own, and to have the courage to express and give it form, a legacy of being colonised. As an indigenous woman of the Tanganekald and Meintangk Peoples, I don't make-out that I speak for

³⁸ The word struggle is used throughout this thesis, as I write from the inside, the story I tell is one of struggle and trauma to survive. There are no other words that better describe the process. Perhaps a more academic language and description would best suit the normal requirements of this thesis, but in adopting other language it would fail to express the story I tell in the way I have chosen. It would almost become someone else's story.

³⁹ Means Aboriginal person, a term used throughout northern NSW and Queensland.

⁴⁰ Fogarty, Lionel, 1995:x. Diana Eades, 1981:11-14, refers to this way of speaking as a form of Aboriginal English, but it is more it is a form of resistance to the colonial order of things.

all indigenous peoples.⁴¹ I am one voice; all of the people in our indigenous law-ways have a voice, even our children. Our voices were once heard in light of the law.

When I first started writing the thesis I spent a lot of time describing Indigenous Law and its relationship to Australian law. I found the process was like trying to fit a system of laws into something that was so fundamentally different and alien that I found myself two years into the thesis abandoning it. Out of that process I decided I would not deal solely with the problem of conflict between indigenous law ways and the dominant colonial legal system. But to take a leap into the abyss back into the known places of the paininggianna, the ancestors, into a journey of discovery of law in relation to self and others. The place of universal truth. A place some say does not exist,⁴² a place where states have no place in the re-ordering of back to the future. A place where law lives. I have chosen to concentrate my ideas on indigenous law ways, raw law. This is a writing from the other side.

This thesis was very difficult for me to write, not only for the usual reasons that a thesis is difficult, but because, in writing the thesis I was engaged in a personal struggle to decolonise myself. The experience was the breaking out of a mould, a colonial mould formed of self, not by the self. In writing this thesis I have struggled to see again from a place known to me - Kaldowinyeri, a place now given place in

⁴¹ The views contained in this thesis are mine, I don't hold out to be the spokesperson for anyone other than my self. I don't hold out for or have any great expectation that my views will be embraced by the Nunga community, colonisation has devastated our culture, identity and belief systems. For example the dissident women giving evidence before the *Royal Commission into Hindmarsh Island*, held different ideas to those women who opposed the building of the bridge, because they believed the bridge would destroy the culture and law of women. One of the dissident women, Jenny Grace when giving evidence to the *Royal Commission into Hindmarsh Island*, Transcript p 4214 said; 'I believe that Aboriginal people had an explanation of how the earth come to be like it is but, you know, as far as I'm concerned, it's gone'. And other voices before that same inquiry spoke of the impact of colonialism upon their ability to know language and culture, see Campbell pp 4607-4610. Dr Fergie in the same inquiry talks about the differential knowledge about different matters in communities pp 5353.

self, that is the voice I write here now. I am more comfortable speaking of raw law in my reclaimed voice, because I am speaking of law from its own place, in its own language, a place which is inside the law. For my thesis to be authentic or truthful, I could see no other way but the way I have chosen to write.

The struggle has been lightened, and I am fortunate that there have been those before me, the elders whom I revere, and their advocates who indicated where the path lay in my journey to heal. The road of endless being, always there waiting to be re-discovered.

My voice is my own. I do not speak for others. My voice is not objective, there is no pretence that it should be. It comes from within, a place I have struggled to re-discover, a place where I have always been. My voice is internal, and because of this it is in danger of being extinguished by science and the call for objectivity.⁴³ In being my own voice I assert my right to be, and in doing this I resist the erosion and dismantling of my self, a naked being of the law. It was inevitable that much of my material would come from the songs, stories and the depth of my own knowledge and dreaming. These thoughts have given me life as I know it now. They have also given me the sight and knowledge to know who I am, for that reason much that is written in this thesis is not referenced or footnoted. It is impossible to reference or document every source of information, much of the knowledge contained in this thesis comes from the living of it, from traditional teachings from an Aboriginal oral tradition.

⁴² Koskenniemi, Martti, cited in Otto D, 1995:100.

⁴³ See MacKinnon, Catharine, 1989:xv1, for further discussion on voice.

I have reflected a lot on why and how I speak and write because I feel a pressure to perform. Why do I feel this pressure to perform, and in what context do I feel it? In this one. The pressure is to locate myself within a space where the muldarbi has been working for centuries in dismantling my Nunga being. The risk of entering this space is to become assimilated by the muldarbi, the challenge is to survive and remain a Nunga. In writing this thesis I see myself as being engaged in a process of translation, rather than one of co-option into the academic narrative.

I have reflected a lot on the use of language in my thesis and questioned what language I should use. An academic narrative, no, a poem or a song is better. One that is clear and truthful to the self, one that is understood, one that is mine. I want to speak to the reader in my voice. And for me this has been a struggle, simply to be, to be my own voice. To re-establish a process which is mine, just like a song that breaks and forms and says what is, in the way that it is felt.

But does that voice communicate to the reader? And, or, how much, do I need to know, or to change about myself to make the communication happen? And how do I maintain the harmony and balance of still being me, while I am engaged in the role of communicator of thoughts; the communicator of thoughts that may or may not be received or even understood?

So why do I try to communicate to the reader? Because the voice needs to be heard outside of my reality. Because my voice, the song and the voice of my grandmothers has been being killed for so long. Writing in that voice is an act of survival and

resistance to a long and continuing struggle, against the killing of the song, the rape, the murder of the mother-ruwe.

I will write in a voice that is mine. A voice which may be constructed by others as being a bit preachy, a bit angry, a bit sad, a bit desperate, entirely soulfully spiritual, dogmatically creationist. It is all of this and more, as I work towards a more 'perfect' place, a place that is still for me a long way off; that is the place where the grandmothers sit.

In being my own voice I assert my right to be, and in doing this I resist the constant erosion and dismantling of my self, a naked being of the law.

I am one voice. The voices of my ancestors come from a circle of peoples, the first circle of humanity to form. And their voice was one of many when spoken in unison. The voices became embraced by the circle of people. They sang the song, repeating the process over and over. That was the law. The song sung. The circle formed. To be repeated over and over. Circles of song sung across the lands and seas. This was law. Raw and naked law.

In speaking in my voice I am not attempting to sing the song or tell the story of creation of place and places within or outside of Australia. I will not speak of the sacred, for that is the law. And in a way there is little of raw law that I will seek to describe in my writing because again that is the law. What I am writing about here is my place, my voice within the circle of song.

From the circle I speak of the law and the land as it is for me. And in speaking, I don't suggest this is the way or position for others, because each other has their own voice to speak. I simply throw into the circle my voice and its connection to the ancestors.⁴⁴ While speaking in my own voice I have not excluded the voices of others; not even the voices of tyrants.⁴⁵ They also have a place in this thesis, but theirs is in the context of how I view the path ahead, the journey to decolonise and heal, and the journey to Kaldowinyeri. The voice of opposition to this process will be dismantled and exposed of its muldarbi nature.

The voice of tyrants previously dominated the voice of self. And left me to ask the question who am I? I am the being I have always been. A being of the law. I am the ancestors who have always lived upon the land and seas. I resist the tyrants' attempts to define who I am. The colonists defined me in terms of blood quantum, being more authentic if 'full-blooded'. Antiquated views of what constitutes a 'real traditional' being are re-affirmed in the Royal Commission into Hindmarsh Island.⁴⁶ I speak more of this in chapters 4 and 5.

⁴⁴ And frequently I find my voice speaking/singing collectively with the silent majority of Nungas, in contrast to the power given to the voices of the vocal minority of Nungas by the media and government.

⁴⁵ Tyrants are those who work against raw law, their voices are found for example, in, the voices of early colonists, past and contemporary administrators of 'Aboriginal Affairs', politicians and transnational corporations.

⁴⁶ As they know it. But it is a place Nungas know of as Kumarangk. This inquiry is further critiqued in chapters 4 and 5.

1.6 Land and Peoples

The land is an extension of self, to be left as it was from the beginning. The first song which sung the land into being; it is the mother, and she gave us life. To destroy the land is to destroy an aspect of self. What began in 1788, with the beginning of colonisation, was more than a dramatic loss of life, and violent dispossession of country. It was also the time they began the covering of raw law. Wherever the coloniser stopped the songs and ceremonies stopped. We were forced to wear clothes, the covering of the law took form in both a physical and an ideological sense and the raw law went undercover. The rape of land and person violated our relationship with the mother ruwe. Our ability to care for self and land was no longer within our power. The dispossession of the naked peoples and the law is mirrored in the environmental devastation of ruwe.

When speaking of the Peoples of this country 'Australia', there are many, thus the use of People(s) plural. The idea of 'us' being big mob, or one homogeneous Aborigine, is a colonial myth. There are hundreds of distinct laws and cultures and peoples of this place you now call Australia. My ancestors', the Tanganekald and Meintangk Peoples, are the first Peoples, the traditional owners of the place now known as the Coorong and the lower south east of what is now known as South Australia. The ancestors shared a common language, and occupied a continuous territory. Our family clan groups carried an intimate knowledge and relationship to the land. A relationship not only with the land and seas but with the greater universe. The indigenous peoples of this place we now commonly refer to as Australia were not one people. Distinct Peoples were connected to all parts of the continent we now call

Australia, all having distinct language, culture, and country. The Tanganekald for example regard themselves as one people, sharing a common culture, and language and occupying a continuous territory with definite boundaries. We were not how the colonist saw us - one big mob roaming aimlessly. The indigenous population has changed dramatically since the muldarbi invaded the lands of the Eora People.⁴⁷ At the time of their coming we comprised 100% of the population, today we are just under 2%.⁴⁸

A myth created by the British colonialist muldarbi, is that we as women were without authority and status in traditional societies. Not true. Indigenous women of Australia have a law known only to women as do the men have law known only to them. White male anthropologists have tended to reflect the patriarchal ideology of colonial Australian culture upon us, and in imposing their own misogynist values they created the assumption that Aboriginal women were oppressed in the same way they themselves had oppressed women. In reality, Aboriginal women, had a considerably higher status within their communities. Ethnocentric anthropologists have ignored the very special and equal place Nunga miminis have shared in the carrying of the law.

There is a saying known to indigenous peoples: it's that as well as being able to talk the talk one must also know how to walk it. In the modern context this is becoming increasingly difficult for Nungas. My ancestors, as they walked over the land, walked in the law. They sang the law, they danced the law, become beings of the law, living in the way of the law. That practice has now become fragmented due to the genocidal practices of colonial and state governments. It is difficult to practice the law when a

⁴⁷ Were the Koories or the First Nations people of what they now call Botany Bay.

car park lies on your ancestors' graves. Or a place for ceremonial gathering and the practice of the law has become a derelict and toxic mine site. Or your brothers and sisters live in fear of gaol, early death, poverty, and ill health.

Indigenous views on human rights and the law are entwined and inseparable from our natural environment. The over-riding idea is a love of the land, a relationship of custodianship between the land and Nungas. But there are few places on earth left where that principle is respected and recognised. The land is viewed by the dominant as an economic resource to be exploited in the pursuit of development and progress. Concessions are made to create zones of protection for some Indigenous groups, but this is not enough, it will not allow the law to draw breath. The dominant states are all - powerful in military terms. The pursuit of our role as custodians of the land is filled with pain. Frequently we can do nothing but watch the process, the destruction of the land and the demise of our people.

The Indigenous relationship to law and land is different from other relationships, others being the relationship of states to land. Haida elder Lavina White in her testimony before the *First Nations International Court of Justice* describes the law of her People:

If somebody came onto your lands without your consent, then you had a right to assert your law and what you call law. Your language (english) is very difficult for me to speak about some things. We view it as a way of life. Christianity is not the way we view it. Spirituality is the way we view things. And even the most minute thing, as the Haida children are told at their level,

⁴⁸ For a further discussion of early indigenous population figures see Butlin, N, 1983.

you cannot destroy even the most minute thing in nature, because everything has its purpose. And so when the white man came, our environment had been very well cared for. We had no destruction.⁴⁹

Against the Nunga view of the land the High Court Judge Isaacs expresses the most valued white man's interest in land;

In the language of the English law, the word fee signifies an estate of inheritance as distinguished from a lesser estate... A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to the land, every act of ownership which can enter into the imagination.⁵⁰

The rule of property institutionalises ownership and control over land; ownership is measured by capital. In contrast Aboriginal laws acknowledge ownership in terms of ancestral and spiritual connections to the land. This form of ownership carries with it custodial obligations in accordance with the law. At the ceremony to celebrate the Aboriginal Tent Embassy's placement onto the register of the Australian Heritage Commission's National Estate on the 9th April 1995, Dennis Walker eloquently spoke:

The real land and law business has not been done. And what I would like to point out to you is that in terms of our land and our law it needs to be understood, as my mother said, we are custodians of this land. And when

⁴⁹ FNICJ 1996, Transcript, Vol 2:83-84.

⁵⁰ *Commonwealth v New South Wales*, (1923) 33 CLR 1 at 42.

people say 'oh we lost this land or we lost that land,' we didn't lose it anywhere. The land is still here and we still have got the responsibility of being custodians of that land. The problem is that we haven't been given the power in the non-Aboriginal legal system to fulfil that custodial right. Until our Elders in Council decide on these matters through their customary laws and until that consent, which Captain Cook was supposed to get, is properly given, then we still live under bad laws.

The bad laws Dennis talks of are laws which violate our laws, our lands and our peoples. The result of these violations will inevitably be felt by all Peoples, as we breathe the same air.

RAW LAW: THE LAW OF SONG AND RUWE

2.1 INTRODUCTION

The 'law' is birthed raw by song. Law is sung into place, land, people, the natural world and the cosmos.¹ All become one with the law. It is law that I speak of here, not 'customary law', lore, myth or story. All other 'laws', are legal systems, which have become clothed by layers of rules and regulations. A system of rules that has dispossessed Nungas and sanctioned genocide. A violence imposed upon colonised peoples is without law.² Beneath these layers the 'law' is no longer visible, and the lawful will of the wider humanity to live in the law is dying, as the expansion of legal systems and their rules and regulations, regulating the behaviour of humanity is growing. Growing into the muldarbi, the killer of law.

This time we are now living is like the time of the Waargle where only a handful of individuals lived in the law. It is the remnant indigenous communities comprising a small minority of the global population who still carry the will to live in the law. The law is ever - present, it lives in all things, all life forms are essential to its being. Law inheres in the land, people and ceremony. Law is the fabric of songs and stories; it is the songs and stories, which speak of the law in its raw - ness.

¹ The sky world is also part of the law-landscape.

² I acknowledge Sharon Venne for her comments at the 1996 Australasian Law Teachers Association Conference, held in Adelaide, where she spoke of the dominant mainstream law as being a complexity of rules and regulations, based on a colonial violence.

Tjirbruki, ancestor of the Kurna People, was a lawman. He carried the law in his song of life as he travelled over the ruwe, singing the law into ruwe as he walked his journey. The Tjirbruki story is law in song and ceremony. It lives today and is revived for those who regenerate from being too long in the belly of genocide. Law is created raw, as is the earth, and its peoples. It is naked like the first peoples who practised and complied with the law. Our laws were birthed by the creation. And like the birthing of the people, the law was born naked. All law was at Kaldowinyeri naked. Raw law is the basis of our coming into lawful being.³ The High Court in *Mabo (No 2)* in their creation of native title said this about our law that it 'has its origin in and is given its content by the traditional laws acknowledged by the traditional customs observed by the indigenous inhabitants of a territory.'⁴ It is this law that is birthed by the creation. We called the land ruwe, mother or grandfather not 'native title', native title is a construction of the High Court, one that has been made even more remote and meaningless to our relationship to law and ruwe by the *Native Title Act 1993*

³ Sharp, Nonie, 1996:168, Sharp in discussing the authenticity of the 'law', refers to the work of Chanock who concludes that the question one must ask is not so much whether the statements made are true about the period with which they are concerned but that the 'Evidence about customary law, then, is primarily evidence about the people giving it, about the circumstances and changes with which they are grappling. Like myth, customary law is timeless: it is a meaningful rather than an 'objective record'. When people refer to customary law as 'old' they are not making a strict statement about its age: they are indicating its *high quality*.'

⁴ The High Court decision *Mabo v Queensland (1992) 107 ALR 1* per Brennan J at :41.

2.2 Being the law

Our old people speak to us in song. They carry law in their being. The law is my centre, from which all cycles form. It is why I am here. Being here now, in the law, in the present, is a struggle against the muldarbi of lawlessness. But I am still here as I have always been, the same soul, the same spirit. A being of the law.

I have many thoughts about the law but they go into the passages of my mind, vanishing when it comes time to write; I am shamed to express completely and openly love of law. Perhaps my reluctance is the part of me that is still decolonising from the shame of being naked. And I ask: why do I desire to express law beyond myself? Why do I carry the obligation to expand this view outside of myself? I do because it is the obligation one carries as a being of the law, to sing its song. The obligation of living in the law is onerous, particularly now, at a time where the law is being violated frequently and on so many different levels, violated by those who are ignorant and dominant, the carriers of power.

2.3 Future cycle of law and its relationships

The law will be in the future as it was before. It is its cycle, one that is necessary for balance and harmony. The story of the Waargle expresses the need to return to law, the cycle of co-existence between law, people and the natural world. Now we are living a time the Waargle speaks of, where law is violated. But the Waargle has told

us, whatever comes the law will go on, the song will be sung, even if it is sung by the few. And as the Waargle spoke to the few remaining holders of the law,

Know your totemic symbol shall always resemble me, the Waargle.

Remember the laws keep this rock sacred, because I will always be here.⁵

The Waargle shows us how the law lives even though only a few still carry the laws. Law lives in the spirit of the Waargle, Tjirbruki, Ngurrunderi, and the Seven Sisters; the law is not unchanging or dying with the last of its storytellers, it is dynamic and constantly renewing, it rises each day at dawn and continues to resonate in all things. Law is this life we are living.

The earth is our mother: this is a relationship that is based on a caring and sharing. From birth we learn the sacredness and the connectedness of all things to the creation. Every aspect of the natural world is honoured and respected. And from an early age Nungas learn to tread lightly on the earth. All life forms are related.⁶

The law speaks to principles. One is respect. It is a respect law for all of the creation, not just humanity but the total ecological environment: trees, birds, animals the entire wholeness and oneness of creation.

Respect is a law. It's the fundament of our association with everything. We all understand it and we all use it, and hopefully we pass that onto the generations coming so that they can function.⁷

⁵ Bennell, Eddie, and Thomas, Anne, 1981:44.

⁶ This has been my experience, here I admit to having generalised, at a time when in reality there are less and less people just like in the story of the Waargle who hold this view of the law.

The law birthed by the great creation is an idea shared by other indigenous people. Chief Oren Lyons of the Onondaga Nation of Great Turtle Island, in his testimony to the *First Nations International Court of Justice*, described the law:

Our style of life and jurisdiction is really what they call the old way, and is, in fact, the only way because if you do not abide then you will suffer, and that is what is going to happen. So we have been given by the Creator the right of our existence, and we have the right to express that in every way. It is old, it is a long time ago. It is nothing new. What we are doing now is battling for that recognition in contemporary societies. We may get into details, but I think for this particular moment we should understand that we have the ultimate jurisdiction.And so, yes, there was law. There was a great law here. Each nation has its own. Each nation has its process and they're very similar. And they all agree as democratic, fundamental democratic law. In fact, the law prevailing in the United States today is the basis of our law or our law is the basis for them. It didn't come from Greece it didn't come from Europe. It came from here. It was here. It was old. And it was amazing.⁸

The law was old, never changing. Everyone knew the law, there was no need to write it down. Law lived in the practice of it, in the singing and in the ceremonies. Songs were a constant reminder of the law an act of reliving and being in law.

⁷ Chief Oren Lyons, giving evidence, FNICJ, Transcript 1996 Vol 1: 36.

⁸ Ibid p 43-45.

2.4 Murrabina⁹

The murrabina, palti,¹⁰ or inma serve to sustain creation. Murrabina is about the life force in all things. Murrabina is law. Law in ceremony. It connects cycles, land, song, story, dance, and the people through a celebration of the wholeness of creation. Murrabina is the honouring of law, it sustains and revives the law, it is the collective song to Creation, a song for law and life.

Murrabina is a celebration for the renewal of life, and the changing of seasons; this is law. Murrabina is a declaration, an agreement with the spirit world, the air, earth, water, fire, animals, plants, rocks, the fullness and oneness of Creation; it is an agreement for the continuance of law, land and peoples. The song becomes an agreement to engage in the wholeness of the creative process of living in the law.

Law creates an obligation for its custodians to maintain the ceremony. The muldarbi obliterated the ceremony over the greater part of this settled continent. More than land theft and genocide was brought with Cook, the physical singing of songs stopped over much of our ruwe. Custodians kept the song in spirit, dreams and visions; that is the law, the obligation to carry the song. And when the fear of the muldarbi is gone the song will sing up.

⁹ Murrabina is a word of the Meintangk and the Buanditj and has the same meaning as inma, meaning ceremony, where the song is sung and danced, as a blessing of the earth and participants, a place of exchange with the ancestors and the natural world.

¹⁰ A Kurna word with the same meaning as murrabina.

2.5 The law is in the song

The song law-stories speak of Kaldowinyeri. Our old people sing the songs over and over again with the birth of each new generation. These law-stories lay a path to follow, a path unchanged by time or circumstance. The songs/stories are the original instructions from Kaldowinyeri. The ancestors created the landscape, or the natural world we have inherited. They laid down law for future generations to follow. The law is sung in song and spoken in stories, sung by the ancestors and passed from one generation to the next. Songs are about the life of the ancestors from Kaldowinyeri. Songs are sung of creation, our relationship to it and our place in the land.¹¹

Songs record the history of the land. They are our medicine; they can be healing. Songs protect against the muldarbi, the enemy of the law. They can be sung to bring rain, stop flood, and change the direction of the wind, or sing a heat wave. Song is the universal order. Song prevents chaos and domination by the muldarbi. The singing of song ensures continuity of life; the cycle of song provides abundance and harmony. Song expresses the relationship to land, sea and people, it unifies all of life. Our laws are not written, they live in the song, the oral traditions of our old people, our paintings, the life ways, the dance, and the land. Law is communicated through the story teller or song holder.

The ancestor is responsible for both the law and country, a responsibility that is carried by the traditional owner of the song today. The owner of the song is responsible for country and in particular sacred places, and when the song travels over

sacred places it can only be performed by the traditional owners, 'in their own musical idiom'.¹² Each clan group has its own story/song of creation, law, and religion, and those songs are often the locally relevant parts of more extensive story/songs.

Under pressure from the muldarbi, Nunga communities were forced to integrate or otherwise disintegrate. Ethno-musicologist, Cath Ellis recorded the following conversation with an elder during field work in an Aboriginal community:

We see everybody going to the pack...boys, and even girls-they do just what they like. The old people that went through the rules, they know better... White fellas interfered in our rules, stopping us from doing our corroborees...No songs, no rules.¹³

What happened to the law? The law is all around us as it has always been, it is still being sung, it lives and breathes in the life force that surrounds us. However, our perceptions of it have changed. Our ability to see and hear which has changed. The natural world is still singing even though the greater part of humanity has disconnected itself from song.

Very few scientists view indigenous knowledge as being of value to the 'modern' world, or present time however physicist David Peat writes:

¹¹ Dixon, RMW, and Duwell, M, 1990, xiv for a further discussion from an anglo perspective of the importance of song.

¹² Ellis, Cath, 1968:139.

¹³ Ibid:2.

Songs come to us from another world, they have their own existence and power....Sound, vibration and song are believed by many to be the creative generative forces with the cosmos.¹⁴

2.6 Law is in the land

The land is our mother, and is both nurturer and teacher, from which all life grows. Law, land and people are inseparably linked. Law has a relationship to the land; its people, spirit, ancestors, and the universe are one. Law: 'It holds the land together.'¹⁵ The distinction between the spiritual and material is a European construction. The Nunga view does not separate; all is one. The song sung emanates from a place in the ruwe, song is connected to specific places, and these places, like the custodian or singer of song become one in the law. This is the law of ruwe. Law holds an eternal relationship or connection to the ruwe, the place of its birth. The creation stories, of the place, the environment and the murrabina are inter-related, and become the being and meaning of the place the law of ruwe.¹⁶

The song law is of place, creating and making the holder of song indigenous to place, the song is alive in the land, the law lives in the singer. And the singing continues in many forms; the muldarbi forced the act of singing underground. Our people also kept the songs in their minds, hearts, spirits, dreams, and visions. The song resides

¹⁴ Peat, D. 1996:142-143.

¹⁵ Yunupingu, G, addressing the court, in R v Yunupingu, transcript of the Magistrate Court hearing Darwin 20th February 1998, before Mr A Gilles SM, p2.

¹⁶ The Meriam Peoples law of Malo is one example of the law of place and sea. The Malo-Bomai story was referred to as the Malo Law Story.

not only in the voice of the singer but in all of these other forms also. Our songs, while they are universal laws, live in the place of their creation; they cannot be transported to another ruwe and given life there. A song may be sung somewhere else but it cannot reside in this other place because it lives in that ruwe place where the ancestors first sang it, in their creative journeys across the land. When Tjirbruki sang the ruwe, the song lay in the land; as he sang the camp to sleep at Warrapari,¹⁷ the song lay in the land, still singing inside the spirit of Tjirbruki and his custodians, singing in their spirit, dreams and visions memories to be reawakened. As it lies now in the middle of a sprawling urban area, the song law of Tjirbruki lives still in that place.

It is the inherent meaning of songs or stories that speaks to others outside its sung space. The story of the Sun Women tells of the caring for humanity, and the need for warmth in every day life for life to continue. While it resides in its ruwe place the meaning in this story carries beyond the boundary of place as well.

Sun

When the world was new, the Sun Woman made a little baby girl. She was not like other babies, because all her body was shining with light. As she grew older, away in the west in the land beneath the ground, she was still the same. When some other women tried to touch her, her body burned their fingers like fire. 'Why does your daughter carry fire like this?' they asked the Sun Woman. 'We are the Sun Dreaming, both of us,' the girl's mother told them. 'When all the land is dark, my daughter will bring you light. But I, my-

¹⁷ A place on the Sturt Creek near Marion, in South Australia, now re-named by its original Kaurna name Warraparinga, I discuss the revival of the old name in the final chapter of the thesis.

self, can't come up above the ground. I'm too strong. If I came up and looked at you all, up there, I would burn you to ashes.' Still the girl lived with her mother. At first there was darkness every where, but when the girl came up into the sky she lit up all the country. 'It's true,' people said, looking up at her. 'She brings light to us all.' They were happy to see her there above them. Everyday, she does just the same. When the first birds start to talk, she comes up into the sky and stands there alone to give us light. Then she begins to think of her mother, lonely and waiting for her, and she moves down in the west on her way home. Down she goes, under the ground, to be with her mother, and darkness covers the land. They sleep there together until it is time for the birds to waken again. Then the Sun Woman sends her back to us. 'You must go now,' she says. 'Go and light all the men and women and children, all our relatives up there. It's all right for you to go, but my light is too strong. If I came, I would kill them.' So she takes her daughter on her shoulders, and they hurry across to the east. There she lifts her daughter up until she touches the sky. 'It's all right now, mother,' says the girl. 'I'm here. You go back and wait for me.' So away she goes under the ground, back to the west.¹⁸

The sun is a part of the greater cosmos, the greater universal cycle of being. The Sun Woman's power is so great it would burn all to ashes if she surfaced above the ground; she must remain underground where she births the daughter sun. Why does the mother remain underground? Is it because of her potency, a potency which may still threaten us today? As they dig her from the earth, and discover her in the form of

¹⁸ Recorded by Berndt, Catherine, 1979:17.

uranium, or some other formation? The Sun Woman tells us that she and her daughter are sun dreaming. The daughter brings light and the sun's rays to the earth as a part of her daily cycle; bringing light to the dark earth, and light to all of her relatives on earth.

Trask writes:

And when they wrote that we were superstitious, believing in the *mana* of nature and people, they meant that the West has long since lost a deep spiritual and cultural relationship to the earth.¹⁹

Reverend David Passi, one of the claimants in the Murray Islander decision, explained to the court his relationship to the natural world:

It's my father's land, it's my grandfather's land, it's my grandmother's land. I'm related to it, which also gives me my identity.²⁰

The indigenous relationship with *ruwe* holds both obligations and rights. The relationship to land is both of traditional owner and custodian. It is a relationship which is difficult to explain in the language of the coloniser; the term owner, for example, has different meanings across cultures. Ownership is not viewed in relation to ownership of material goods, but of other values: knowledge, business, a relationship, a problem, a dispute, a ceremony. Ownership is not exclusive. And it does not define the owned object as a commodity; instead it defines it as the concern of a limited group of people who stand in a particular relationship to the owner and

¹⁹ Trask, H, 1993:153.

²⁰ Cited in Sharp, Nonie, 1996:164.

whose various responsibilities depend on that relationship. There are both managers and bosses, for example. And each has a different responsibility or right.

The obligations I speak of here are to the law-song of place handed on to the song holder from the ancestors. For example, for the ancestor Tjirbruki, the obligation was not to kill the female emu in the hunt, for the preservation of the species.

The anthropologist Stanner tries to comprehend what our relationship to ruwe is like;

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggestive though it be, does not match the Aboriginal word that may mean: camp, 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre', and much else all in one. Our word 'land' is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. I have seen an Aborigine embrace the earth he walked on. To put our words 'home' and 'land' together into 'homeland' is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we called 'land' we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the

complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter: no social network had a point of fixture left.²¹

The Nunga connection to ruwe comes from a place that lives within the law, the law is the land, land is the law, it is not like the dominant christian culture, where land is a commodity , a non living entity.

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle and over all the earth, and over every creeping thing that creepeth upon the earth.

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.²²

Nungas revere and hold ruwe to be sacred.²³ The old people had a deep understanding that land is life, the source of all things, to be revered and honoured for the sacredness that lies within. The entire landscape is filled with the sacredness of the Creators' laws. But in protecting the land we frequently have no choice between the threat of physical violence and incarceration. In *R v Walker*, Baizam Nunukul,

²¹ Stanner, WEH, 1979:9.

²² Genesis, Chapter 1 Verse 26 and 28.

also known as Dennis Walker of the Nunukul People, was arrested and charged for assault and discharging a firearm with intent to evade arrest. Dennis was protecting an Aboriginal burial ground from being destroyed by the local council. Walker's long history as an indigenous activist and his long standing and numerous relationships to Nungas who had either died or suffered torture whilst incarcerated provided strong grounds for Dennis in taking action of self-protection against an armed police officer. His actions were fully supported by the elders, who argued in Walker's defence his right to uphold Bundjalung law, in the protection of sacred sites. However, Walker was convicted and a subsequent appeal against conviction was dismissed.²⁴

2.7 Laws relating to land

Central to the Meriam people's law of Malo is the law against trespass; *Malo tag mauki, Teter mauki, mauk*, means Malo keeps his hands and feet off other people's land. Malo's law was to 'Keep to your own path, do not go on to other people's land....Malo walks on tiptoe, silent and careful,' and as explained by David Passi,

this is a metaphorical way of saying what every Meriam person knows: if people keep to their own path, their own land, mind their own business, social life will continue.²⁵

Gobedar Noah explains the Meriam People can only identify with their own lands:

²³ For further discussion see Swain, T, 1993, and Meyers, F, 1988:271.

²⁴ *R v Walker* 20th November, 1994, unreported NSW Court of Criminal Appeal, Gleeson CJ, Allen J and Barr AJ.

²⁵ Sharp, Nonie, 1996:19-20.

with the word from the authority he can be sure because Stars follow their own course. Everything and everyone has a proper place.²⁶

Malo is the octopus, there are the eight clans of Malo. The executive arm of the octopus unites the eight clans; and the sacred centre is the site of sacred houses *pelak*.²⁷

The Nunga way for entering the ruwe of another nation or clan involved for most a process and protocol that was always carefully followed so as to avoid any possibility of conflict. Our relationship to ruwe was not adhered to by the muldarbi when they first arrived on our shores, so they lost the opportunity to learn about another way, an ancient way, a way their own ancestors had departed from. It was a relationship to ruwe that was intimately known. Boundaries of ruwe were marked by bends in the creek or the river, the rain shadow, trees, rocks, etc. All of these sites were known in song, and sung to by the custodians.

In the matter of *Yunupingu*, the defendant a custodian of Yolngu country and law held lawful obligations to the maintenance of the law. It was proper Yolngu behaviour for a stranger to a community to approach the senior member of the land, to seek permission before entering the land. The taking of photographs, for commercial purposes without the permission of the senior elder, is an offence against Gumatj land and Yolngu law, the following is taken from the magistrates decision where Galluwry Yunupingu was charged for the assault of a photographer coming into Yolngu land.

²⁶ Ibid: 75.

²⁷ Ibid:144.

Under Yolngu law, the image of the land is valued highly. It is believed that the reproduction of an image of the land interferes with Yolngu law because it diminishes the integrity or the strength or the wholeness of the land.

The land is considered to be what non-Aboriginal would call 'land' that is, the ground, the trees, rocks and streams - that is the landscape - as well as the people on the land who identify with the land - in this case the Gumatj people - images of the land, which include images of the people who identify with the land, and its spirits.

A photograph taken on Gumatj land of a Gumatj person, or of a part of the landscape, is an image of the land. A special significance is accorded to the image of a person. I apprehend, as a non-Aboriginal person, that the special significance is this: a photograph of a Gumatj person on Gumatj land captures the spirit of that person so that an image is produced of that person, is an act of capturing the spirit.

I apprehend that the taking of an image, including a photograph away from the land, without permission, results in a loss or diminution of the value of the land. This is because the capture of the spirit in the image means that the spirit cannot return to the land.²⁸

Nonie Sharp writes about the complex relationship between law and land of the Meriam people of the Murray Islands and while there is greater difference between

²⁸ As above fn 15:3. Rarely do the courts find in favour of a Nunga defendant, the matter of Yunupingu is an exception to the rule.

islander and mainland cultures than there is between mainland cultures there are striking similarities. Similarities that can be found in the way the laws about ruwe are woven into the natural world:

The Meriam people's link to land is two-sided: they both own land *and* belong to it, a dual relation of right and responsibility. This double-sided tie to place, where place begins from land handed down through patrilineal inheritance, includes simultaneously the wind or season to which celestial alignment or 'quarter' that land belongs. In this way, the Meriam are positioned or located within natural cycles, which create the milieu of rights and obligations to land. The pattern of the movement of these cycles provides the metaphoric language of fundamental truths upon which the moral order rests: stars follow their own path across the sky. This, one of the laws of Malo, has several layers of meaning which, above all, define identity.²⁹

While the song-law is specific to place, and has a sense of boundary it is unlike the boundaries that are constructed by the grinkari,³⁰ who maps straight lines across the land marking state boundaries over our traditional territories. The song does not travel in straight lines and cut neat boundary areas between different peoples. Some regions were shared areas between different peoples and some were restricted applying strict rules for obtaining permission to travel across the country. In the story of Tjirbruki he was careful to not transgress the boundary of the Peramangk people when he walked towards their country from his ruwe in the Kaurna lands. It is from his actions we learn of lawful behaviour, to not trespass on the ruwe of others.

²⁹ Sharp, N, 1996:9-10.

³⁰ Meaning white man.

The Karajarri, a coastal desert people, live south of Broome. When they approach the land or the water they do so with reverence and respect. A failure to properly pay respect to the spirit ancestor resulted in still waters “rising up...like a great wave and come towards her children. ‘I saw it. My own eyes.’”³¹ The Karajarri, like other Nungas, worry for the country and the spirit ancestors that lay in the landscape.

Mostly, though, they worry about the serpents. Senior boss law man John Dudu was born on Shamrock. This side of Karajarri country, the salt water side, isn’t really his country. He’s more from the fresh water side, further out towards the desert, but his position now allows him to speak for all the Karajarri lands. His people would traditionally come this way to the coast in the dry times. In his day, though, they came during holidays from working the cattle. He doesn’t pretend to know exactly what will happen if the snake gets angry, or if the water goes down and the snake dies. But he fears it. He was taught the song to bring this spring’s water back if it ever went down. He’s never sung it. Never had to, but he could, if needed.

What worries them is that they have to look after the country and if something happens to it, something will happen to them. Larger forces are at work. They’ll get sick, die or suffer. It’s life and death.

Dudu explains: “There’s a big water underneath. The mother of all water, Gurdan. It keeps the water alive, at the level it is. What happens if this goes? What happens to the roots underneath, the trees, the animals? The Bugarrigarra (dreamtime) put all the hills and springs and rocks there on top of

³¹ The Australian, Weekend Magazine, October 10-11, 1998:42.

the ground. And also underneath. We worry about what's happening underneath. If something goes wrong, we worry there will be big winds. Big storms. This can happen when strangers come along. When things change. Our job is to keep everything quiet. If something goes wrong, what's going to happen to us?³²

Australian rules of law and their relationship to the land is in opposition to our understandings and relationship to country. Justice Moynihan³³ referred to 'an enduring relationship to the land' and yet he was unable to find a system of law. However his finding was sufficient for six of the seven High Court Justices to declare a system of rights in land existed and continues to exist in the Murray Islands. However Brennan J said: 'the findings show that Meriam society was regulated more by custom than law.'³⁴

The laws of property can never express the Nunga relationship to country. The native title regime has established a process where native title holders can enter into negotiations relating to proposed developments of their ruwe. These deals on native title are the most recent example of accommodating needs and interests, at the expense of and loss to the custodian left to carry out ancient obligations and responsibilities to ruwe and song.³⁵

³² Ibid p 43.

³³ Justice Moynihan, is the judge of the Queensland Supreme Court, to whom the High Court delegated the power to determine the facts of the *Mabo (No 2)* case.

³⁴ *Mabo v Queensland* (1992) 66 ALJR 408 at 411.

2.8 Law is the song of the collective

The voice of the individual is but one within the circle of the collective. The place of law is to maintain or restore a sense of harmony and balance between individuals and groups; one of its purposes is to maintain harmony amongst the collective community.³⁶ The collective is the gathering of all things in relationship to each other. Law maintains the wholeness of life, the inter-relationship of people to each other within clan groups and their relationship with the natural world. The focus is on the 'group', or the collective rights and obligations, rather than solely individual concerns.³⁷ Remnants of this idea barely survive amongst those who call themselves the non-indigenous; and in their christian ideal, an ideal that is supposed to inhere in the common law: love the other as your self; (a ideal problematic in a world of self-hate and oppression.)

That foundation could not actually be anything else than the law of love, love the other as yourself. This is a proof by exclusion. Anything else, any movement at all away from the lawful equality of the other, is a movement to the private.³⁸

I have taken the 'public' or the 'love of the other as yourself' as the collective being perhaps now lost to the non-indigenous. The time in the garden was when they discovered self, the individual departure from the natural world of all things bound collectively by the Creation.

³⁵ For further discussion see Trask, H, 1993:139.

³⁶ Jackson, Moana, 1995.

³⁷ Ibid:248.

In speaking of Maori law and the obligations of the collective Moana Jackson adds further to this picture of the obligation held 'between the human world and the earth to which all would eventually go' the collective is inclusive of the natural world as it is in relationship to us, as the mother and the father are in relationship to us:

The jurisprudence of philosophy of this law developed as a set of proscriptions and prescriptions about how humans *ought* to behave - with each other, with the world around them, with the divine beings, and with the memories of those who had gone before. ...Maori society was, and still is, built upon three inter-related parts - iwi, hapu and whanau. ...Because the human construct of iwi, hapu and whanau shared a common divine origin, there was a similar set of interrelational collective obligations with other iwi/hapu/whanau, and with the divine beings or atua from whence they came. Likewise there was a set of interrelational collective obligations between the human world and the earth to which all would eventually go: obligations illustrated in a tangible and symbolic way at the beginning of life by the placing of a baby's afterbirth (whenua) in the earth (whenua).³⁹

The UN Draft *Declaration on the Rights of Indigenous Peoples*, refers to a number of collective rights affirmed by indigenous peoples. The following are a few of those references to collective rights:

Article 3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

³⁸ Detmold, Michael, 1997:107.

³⁹ Jackson, Moana, 1995:245-246.

- Article 4. Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully if they so choose, in the political, economic, social and cultural life of the State.
- Article 6 Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.
- Article 7 Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide.
- Article 8 Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.
- Article 9 Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.⁴⁰

It is through the law people learn about the interrelationship with all things, the land, people, law, the natural world, and the cosmos. In the story of Tjirbruki we learn that when individual desire manifests it becomes the destruction of all of humanity. The Meriam learn that Malo plants everywhere the deeper truth and;

As ye sow, so also shall ye reap. ...Malo makes possible that mediation which brings the 'other' into the realm of the 'we' through the reciprocity of sowing and harvesting.⁴¹

We learn also that when the Frog drinks up all the water there is no more sharing, and that the collective must find the way to fix up individual greed they bring to the community the medicine of laughter to prevent the otherwise inevitable death of all things in the natural world.

2.9 Can you kill the law?

In the Waargle the law lives, even though most of the people have lost the ability or will to live in the law. The law of Waargle continues and is maintained by the few survivors. Moana Jackson argues that the law of Maori also cannot be ceded, nor can the authority of the law be given away;

Maori could not 'carry' their law into the tribal territory of another, nor seek to impose it beyond acknowledged boundaries. To attempt to do so would lead to war. And if iwi could not impose their authority neither could they give it away. Indeed, the idea that rangatiratanga could be ceded to some other authority was impossible, illegal in fact, because it was culturally incomprehensible. No matter how powerful leaders were, they could not give

⁴⁰ Draft Declaration as Agreed Upon by the members of the UN Working Group at its Eleventh Session, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on its Eleventh Session, E/CN.4/Sub.2.1993/8.

⁴¹ Sharp, Nonie, 1996:163.

away the authority which had been handed down from the ancestors in trust for the future.⁴²

The law of Tjirbruki is not extinguishable, it lives in the land even when the place that embodies the spirit of Tjirbruki is destroyed through the mining of pyrites at Brukunga the law of Tjirbruki remains alive. And when they spread the pyrites that is the body of Tjirbruki, they have mined from the site at Brukunga across the Adelaide Plains they poison the land. The law lives to teach once again that when individual desire – power manifests itself, it becomes the destruction of all of humanity.

The law cannot be extinguished, not even through the agreement of Nungas who have been coerced into agreements that on the face of it express an intention to extinguish the law. The *Native Title Act 1993* agreements are a case in point where some members of the Adnyamathanha of the northern Flinders Ranges have entered into agreements during 1998 for the mining of uranium. The agreement was entered into even though the Adnyamathanha as a collective had not all agreed to the mining of uranium nor decided whom were the appropriate traditional owners. Another recent development relates to native title negotiations between native title stakeholders, and the state government regarding a proposed nuclear waste depository site to be built in the Billa Kallina region that is in the north of the state of South Australia.

A few individuals do not have a mandate from the collective to extinguish the law or to enter into agreements that are damaging of ruwe and law. The law continues to run

⁴² Jackson, Moana, 1995: 260.

regardless of what is said and done through agreement or unilateral action taken by governments, it is only the Creation itself that can extinguish itself and its law.⁴³

2.10 Law and secrecy

The story goes that on days when the mountain is wrapped in clouds the men vanish in that direction to perform mysterious rites. The Pueblo Indians are usually closemouthed, and in matters of their religion absolutely inaccessible. They make it a policy to keep their religious practices a secret, and this secret is so strictly guarded that I abandoned as hopeless any attempt at direct questioning. Never before had I run into such an atmosphere of secrecy; the religions of civilised nations to-day are all accessible; their sacraments have long ago ceased to be mysteries. Here, however the air was filled with a secret known to all communicants, but to which whites could gain no access. This strange situation gave me an inkling of Eleusis, whose secret was known to one nation and yet never betrayed. I understood what Pausanias or Herodotus felt when he wrote: "I am not permitted to name the name of that god." This was not, I felt, mystification, but a vital mystery whose betrayal might bring about the downfall of the community as well as of the individual. Preservation of the secret gives the Pueblo Indian pride and the power to resist the dominant whites. It gives him cohesion and unity; and I feel sure that the

⁴³ It is a common thought of indigenous peoples that the natural world is speaking to us in the voice of natural disasters, the message being, that it is time to stop the genocide of indigenous peoples and the ecocide of our lands. It is a time to review plans to indigenise the planet for the future. These reports of natural disasters are now commonly reported in the media. In an ABC News Report of Wednesday 30 December, 1998, the CSIRO sounded a harsh warning, about degradation. The CSIRO has warned that in many parts of the country, levels of environmental degradation are close to reaching the point of no return. Western agricultural techniques are being blamed for increasing dry land salinity, degradation of rivers and more recently coastal waters and estuaries.

Pueblos as an individual community will continue to exist as long as their mysteries are not desecrated.⁴⁴

The Law is layered. Parts of it are for public knowing whilst other layers are for 'those who know'. Parts of the law are veiled in secrecy. This is a means of protecting and maintaining the law in a way that is 'proper'. The maintenance of oral tradition is strengthened by the passing of stories through the 'right line', and not leaving it open to the public domain.

Nonie Sharp writes about some of the issues that have arisen out of the Meriam bringing their claim before the public. Writing down the law has the potential of becoming a *muldarbi*:

the old secret ways which convey a sense of mystery and danger in wrongdoing are coming to be supplanted by public by-laws.The court case has contributed towards a strengthening of Meriam culture by making explicit Meriam custom, law and meaning systems. It has also created new paradoxes. In the new circumstances of recognition of native title at the Murray Islands, the laws of Malo, a subject of public reflection and private introspection, are being incorporated into the Mer Island by-laws. As we have seen, Malo's Law exists in various versions, a result of the flexibility of the oral tradition. However the past generations saw it, contemporary Meriam Law in written form transforms and reifies Meriam society into bounded categories, inhibiting the creativity and flexibility which are the hallmarks of the oral tradition.⁴⁵

⁴⁴ Jung, Carl, 1993:277-278.

⁴⁵ Sharp, Nonie, 1996:170.

2.11 Learning the law

Learning the law is difficult under the impact and restrictions the muldarbi has placed on the natural processes of learning the law. Law is a dynamic process; it is based on truth, truth in creation, not greed and power. In the following quote Ngunytaj Napanangka Mosquito speaks about the need to learn about the law to protect the country:

We want people to learn about our culture

We got a lot of stories ...secret ones too

Too long people not listening to women

Not listening to Aboriginal people

We women got our own Law and Culture

Different from men

We not stupid

Giving you very important stories about our culture

So you people understand

We wanna spread our stories down to Perth...and other side

Overseas too...right around

Our children wanna be learning our stories

Keep on Hanging onto our culture

Keep it strong

Listen to what women saying

It very important
We getting old now
We worrying for mining companies
They think we stupid
Treat us with no respect for Culture and Law
Government mob too
We know how to look after our country
It very special to us
You'll see
You'll understand.⁴⁶

The colonising process had the effect of shutting down the law; in many places indigenous peoples were forced to abandon the law and its practice for fear of their lives. The learning of the law was taken underground, or simply dropped as being too difficult to maintain, as the impact of the muldarbi was felt and the history of separation of families, and the isolation of the elderly from the young disrupted the ancient ways of teaching the law.⁴⁷

⁴⁶ Recorded by Crugnale, Jordan, 1995: in the Introduction.

⁴⁷ The *Aborigines Acts* established a regime for the removal of young Nunga 'half-caste' children from their families, to be assimilated into the white supremacist culture of the muldarbi. I refer to this history more in chapter 5. See, Wilson, Ronald, 1997, *Bringing them Home: Report on the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families*, documents the stories of many of the Nungas taken from their families,

And since the system that was imposed on us has changed things for us, the grandmothers and the grandfathers don't teach you. They go into homes, into white man's built homes for the old, for the seniors. And they're not cared for by their families. I fought against that for a long time because our people have always looked after their aged and they have always looked after their children.⁴⁸

Kevin Buzzacott⁴⁹ speaks of the colonisers' invasion of our country as a coming to our ruwe in the wrong way, a process in need of reversal before we can fully come into a place of learning and sharing the law. Kevin Buzzacott in giving evidence before the Australian Capital Territory (ACT) Genocide case spoke of the hardship he experiences as an elder and custodian of law and culture. He reveals problems that carriers of the law have when our laws are violated in the following evidence before Justice Crispin in an application for a declaration that genocide is known as a crime to the ACT. I worked with Kevin Buzzacott and others on submissions to the ACT Supreme Court, I was writing these submissions at the same time that I was writing the thesis. Kevin is writing this thesis also, in the same way that the grandmothers, grandfathers and my mothers are, and all the others I have worked with in the struggle

⁴⁸ White, Lavina, FNICJ Transcript 1996 Vol 2 :75, the Haida of British Columbia suffered also from the policies of forced removal of their children.

⁴⁹ Arabunna elder Kevin Buzzacott has a custodial obligation to take care of Lake Eyre, to prevent the natural mound springs in the region from drying up, because of the tapping of natural water flows. Western Mining Corporation is using vast quantities of the water for their uranium mine production at Roxby Downs Uranium mine.

for the land. They are also writing this thesis with me. Such is the collective will and nature of the process.⁵⁰

MR BUZZACOTT I am Kevin Buzzacott from Lake Eyre belonging to the Arabunna tribe and I have joined all the other families in this genocide case. I have joined the embassy (Aboriginal Tent Embassy). First, your Honour, we brought in our sticks...We ask you to come down to the fire - to get you to try to understand more about Aboriginal people and how we link together and how we are bonded to this country, and our laws, our culture and all that stuff.

And before any decisions that you might make here today, ...I wanted to refreshen your mind on what all these sticks really was about. And the one here – (illustrating the three different spears he has brought into the court) I must say this is a do or die situation here. We have come too far to turn back. For us to come in here - for me it is the first time to be able to present what I am really on about. Since the first invasion, the Europeans coming here, we have never really been able to put our views forward. And there is a lot of our people here today. I would just like to say that they are not here, they cannot make it because of the resources. They are short on resources.

⁵⁰ In *Re Thompson; ex parte Wadjularbinna Nulyarimma and Ors*, (1998) ACTSC 136, Crispin J.on Transcript of proceedings, Friday 17th July 1998 I realise that this is an extensive quote and had initially considered including it only as an appendix. But I have made the decision to not separate the body of the text, wanting it to remain whole, and in keeping with the overall theme and ideas on wholeness that I have argued throughout the thesis. The quote is an illustration of the dialogue between Nunga genocide prosecutor and judge and assists in the process of learning the law suggesting possibilities of how this could also occur in the future.

They are in sorry. They have lost loved ones and they are sick themselves and looking after their families, struggling and that to get here, so they cannot be with us. And so it is full on. Genocide is full on here in this country. And the part of the struggle was...for you to subpoena - go through your authorities and subpoena the Prime Minister and these other fellows to come along so they can face the music. And as I mentioned down there that I was concerned about you...because it is too big for one person to carry all that - to make that decision.

And I am saying these fellows with all these setbacks in these hearings that the decision should have been made. These people should have been summoned or subpoenaed here, the so-called authorities, which we argue that do not belong to this country. They came in here, massacred and everything else and took our land - stole our land and they still have it today. So it is pretty desperate. I just want to say here - this stick here was one of the three that we talked to you about. Now, it is no monkey business. We are not here for a tea party or joke. This one here represents and symbolises all the old people that fell in the battles.

And even the ones that - too come, they will join our old ancestors, our masterminds in spirit and everything on this stick. And also - this stick also - we have got the predator. This is what I call - describe the

predator that upset our world 210 years ago. We have got it. This is the predator, with its law and policies and stuff. Also they created a system - they even created your position and your role as the judge. And also it is my role, from where I am coming from, my authority, my law, the law of this old ancient country and all us old people that fell by the predator, I have to follow that up. That is my role to make sure that justice is there, the desecrations and the stuff that is going on.

For today I have narrowed down the predator to one person. I said to you, and it still sticks, that I offered you a gift and stuff down at the place as a brother, I said as a brother, and that still stands but the situation is so great, it is either your mob or my mob. The family, you the family, I of a family, I have to walk out this door or walk out this court winning. I cannot lose because otherwise my family is going to lose. My country is going to get destroyed so I have narrowed this predator down to you for today in your position. I know you have a family, you have a wife, three kids and you are a member of the United Church or something like that and that is your authority and that is your belief but this is my belief and I want you try and understand from where I am coming from. And it is like, if you - either you or me for light - to gain light to the right to life to live peacefully in harmony within our families as well as our villages, one of us has to go or one of us will have to lose and that should not be the case because this system that was developed by the predators before you and I were born is so evil, is so bad, it is not funny.

Where they used to go out and massacre people, now they do it in sophisticated ways with their legislations and the acts and the policies. The elections are coming up soon. None of these pollies want to run with genocide. They have got Pauline Hanson running around doing all sorts of stuff. Even in your position, you know people like in the courts, you could not stop her from doing what is doing and we can offer a peaceful out. That is why we offered the other gift - the gift thing. And if people can come, if the authorities, if you could subpoena these so called artificial authorities to come down and sit down with us so we can put our law, our views forward.

Brother, it is more than that. I have to say to you, it is my - it is an honour for me to go into action, if necessary, but I do not want to do that. I do not want to go to war with you and I do not want to see your family hurt as much as I do not want my family to hurt. I have your spirit in me. I can break your spirit. You have been down to my fire. I had the image of you at my fire, our fire, and I do not want to see any bad things happen to you. Like I said, it is you or me, there is no turning back and we have to make sure.

My army is the old people, as well as the living but I am really in debt to the old people. I have got - there is so much energy and power of theirs - it is not funny. And this stick here is really - I will say it in my law, in our ancient way - I should have the right, it is my right, my

natural right, common right, whatever way you want to say it, to get you, the predator, that upset my world, I should have every law and right to take you out because I have narrowed you out with this - with this stick that is a thing for the herd as the protector of the herd, the village, the humpies. But I cannot do that. I do not want to do that. I would rather you summons those pollies.

Do not take it on yourself and come - and come and sit down and make peace. It is wrong, a little bit wrong to do that. I cannot do that in that sense but at the same time it is going - but what do I do, where do I go if I cannot get this through to people like you and if I cannot get through this so called court that is ruling this country, then where do I go? One thing is for sure the evil thing will go on if we do not eliminate this, the predator. And if you was to say, chuck us out now, then you could be in for a bad run.

There is so much energy out there and I am a little bit worried about that because a lot of people out there are getting hurt for unnecessary things. But like I said we are at a point now where you have to make the decision. It is you who has authority your authorities to subpoena and summons them fellows here so we can sit down and do it and help us, summons our resources, our mob to get here to be able to do it. There is no other way. If you want to subpoena me for disturbing your court or bringing in this talk here, well then fine. If that is the way you wish, if that is the only way of solving or a decision, then I will be glad

to accommodate. That is your way and then you will prove that genocide still exists. It is full on. It is here today.

Forget about the year 2000 and the games and other ways of drinking wine and entertainment and saying that they own this country and they are the proud Australians and make a peaceful life, that all these people talk about. It just will not work. This is our country, we have the key for this country. The survival of foreigners, the Europeans and all of them foreigners to this land totally depends on us. So you are the fellow who can make that decision and make it today and make the changes. Had you did this in the first place - we have lost a few people, we have lost families out there - also it could have made that difference.

And if you are going to keep on going, who knows, I may not be here next time. Somebody - some of these other people may not be here. You will see more broken chairs and things, because it all adds the pressure cooks on people.

HIS HONOUR: Mr Buzzacott, I certainly do not want to wish you any summons against you or anything like that. I want to hear everything you have got to say. At the same time you are very aware of your own law and your own obligations under your own law and you need to understand that my own law, the law under which I work imposes real limitations on my authority.

MR BUZZACOTT: Okay.

HIS HONOUR: In listening to this application I have to act in accordance with legal principles. I do not have any authority to step outside it. And in particular, I do not have any authority to over-ride the common law of Parliament.

MR BUZZACOTT: I mean, well, this is the whole problem you know. This is the whole problem. I mean, that has to be changed. You have to have - you know, it is all this artificial way, this predator, that created this system, you know. And that is what we are talking about. That is what the whole trouble is. That system that we are living with today it just does not cater - it just does not serve. It is all evil, it is so bad. I could not do your job if that was the case. I would resign. I would go to the media and I would go to the world and I will say, "Look, I cannot do this job. I cannot help people from suffering and dying and so on out there and I couldn't do that." Either change the system or leave the job, announce it and go if you cannot do it, because this system, the foreign system, is actually the one that actually doing all the things around the world.

I mean, here, you know, that is actually for changes. If it is not serving the people - I mean, your bosses - I do not know whether you have

bosses, but as I said, the people who created you or your role or your position, then what is the good of it? Chuck it out and let us make the peaceful one. Let us all get involved, subpoena these fellas and get them down or bring them down for a workshop or a picnic or something else, 'cause we cannot do our job either. And these fellas own our land. You know we are on the footpath. We are living on the street. We have not got resources like these fellas. They are reaping the benefit from the land and they are doing it bad way with the big mining companies and stuff - but anyhow they have got all the say. We have not got nothing. We have got the misery and the suffering and the pain. It just goes on. I do not know how you people could sleep having a job like that.

And I would make that move, and I would also encourage my fellow law students that are coming up as judges or whatever they are called, I will tell it. I will tell the world that this system is no good. I mean, how many people they put away in gaol, they are not even criminals. Under our law, under our thing, we are not the criminal, we are not the trespassers. We have a right from ancient time to live and love these streets and protect our families, our rivers, our lakes and all that sort of stuff, our mountains. We were born with it and it is not going to go away. We have been here since whatever, since time began. Change the bloody thing. It should be changed. And also these politicians. Make a statement like you did to me. Make a statement to the election

that is coming up, the campaign. Make a statement to those people that it is not working, it is no good, you have not got the recipe. We have got the recipe for life here on this land. It is our land, our foot, that they are walking on. It is not theirs. And when we talk about spiritual and loving and living, you know, it is all artificial and it cannot go on and on and on. And it creates all that racist stuff and everything else.

Well, I would like to become your brother. I would like to be able to go and sit down and share my culture, my land and my families and deal with you. You know, do it. Do not let these fellas rule you all the time. Do not let these - do not worry about their job. Forget about the bloody job and the money. That is another creation of the system that pays the rent, you know. We did not have that system. We walked the rivers. Our food, we will work out there. We walked out there and we picked the berry and the grass and - we have our food out there. We did not have pay no rent and live in - on the footpath in a little square, in a little thing. Change the bloody thing. These fellas come here wrong way to this land 210 years ago. Let us change it so that your kids and my kids can run freely and live free. We are free people. We are not meant to be in gaol. You blokes cannot keep putting us away in gaol, send us to Long Bay and all these other gaols, Goulburn and all these other things. That has to stop. That is evil. That is bad.

We have got to look at what we were put on earth in the first place. This is our part of the wood. This is our neck of the woods, Australia and the surrounding islands and that. That is our role. Put the bloody responsibility back where it belongs and let us rewrite the history. Let us clean up youth today. Unless we before we talk about today - you cannot talk about today unless you clean up yesterday, and then we can make a better future for tomorrow so your kids and my kids or you and me, whatever life we got left, we can make the changes. We can walk together so that our kids can laugh together and get rid of all that other stuff. I mean, I am sure you do not want your kids walking the streets around here now. I do not think I could even let my old dog go in our cities and communities with all the evil that is around.

Even the abuse that we get at the Embassy there where people, where louts are driving past abusing us and whatever else, we do not know whether they are going to attack us or blow us up or not. But the stakes are so high we have to go and do it. We are wishing on you people to do it that way cause we cannot stop, we will go another way.But it is getting to a point, what do you do, where do you turn to? Make a statement, brother, and tell these fellas. Test the system out. Make it work. And if us people that is living today - you are responsible person, father and everything else as well, well, make it now, clean the deck up now so that our kids can have a future, they can have the right

to a future that they deserve. And this whole country, they can look after their country, this whole country, like how they should be.

I mean, do not just chuck us out because the Prime Minister or Pauline Hanson or the Nationals or the fascists or whatever you want to call it direct you, "I'll meet you at the Lodge", or whatever it is. Forget about that, brother. Think about here. Let us fill ourself up with the real spirit and the real peace, the right to life. Let us give our little babies a chance. Let us give this whole country - it does not deserve this fuss. This is evil, brother. We have got to clean it up, you and me. Let us do it. People out there fair dinkum, let them come forward and bloody do it instead of putting us through all this stuff every day and night, every minute of the day, 24 hours a day, so many hours you have nightmares of it, flashbacks. We cannot even feed, give our little babies nourishment. We cannot teach them anything the rights and wrong, because we have not got our bloody land back.

The other people have got it. They got sheep and cattle. They prefer sheep and cattle than us. Take their sheep and cattle off. I want to put our kids back. Put the kids back on the land. They are the ones who belong to the land, not the sheep and cattle that ploughed up all the grains and stuff and got rid of our bush tucker and medicines and everything else. All money, money, money. Get rid of the money as well. It all came to this here as far as I am concerned. It is evil. Let us

make a move now and show the rest of the world how to go, what the direction is. It is not going to go away either. It is full on. We can pass the buck and say, "Okay, forget about it, let us go." It is going to go on. The suffering and the pain, you know, it is going to go on, the misery. I do not know how many people die a day in Australia or get sick. Thank you.

HIS HONOUR: Thank you, Mr Buzzacott. You speak well.

After many other submissions from Nungas from all over Australia, all of similar content and eloquence Crispin J decided to refuse the application, holding there was no crime of genocide known to the laws of the ACT. I discuss the genocide case in further detail in chapter 5. The depth of difference between Nungas and those who call themselves the non-indigenous is illustrated by the above decision. The genocide case brought face to face Kevin Buzzacott a carrier of Arabunna law holding obligations to care for country and Justice Crispin an administrator of the muldarbi law having obligations to maintain the rules of the law. But it is Crispin's rule of law that is killing us now. It is a death Crispin J and others do not comprehend as coming to them tomorrow.

Nungas have an understanding of what is true, and that is what we know and believe. All that Kevin Buzzacott speaks of Nungas know as a truth, one that speaks our law. A law that interacts with a system of rules that patronises in its response. When asked the question by Judge Leroy Littlebear, of the *First Nations International Court of Justice*, “Is there a word in Haida for the English word ‘justice’?” Lavina White’s reply was:

Yuk eah, the truth, which we don’t find in the justice system of those who came is the closest I can come to explaining what justice is. In Haida culture we didn’t have jails and we didn’t have police. We had a way of dealing with things within the culture, within the clanship. Each clan was responsible for their members and the clan decides, if one of them have violated someone else’s property or person, the clan mothers—the clan chiefs decide what the punishment will be. And if it’s a very bad violation, then they are banished for a period of time, which is—they’re trying to practice that now and it bothers me because —maybe it was different where they’re doing it — but in our culture you didn’t banish somebody by themselves. We were more humane than that. ..I wanted to banish the man who violated our children in the boarding schools. Banish him back to the country he came from. And I think that anyone who violates any of us in Canada should be dealt with in that way, banish them back to the country they came from. Howah.⁵¹

Our laws in this country they call Australia were very similar to the laws of the Haida, that is the truth translates as justice. The law of ruwe was our truth, we followed the sung tracks of the ancestors, and its laws that was our truth. That was what we knew. The tracks of our song law have changed, as those who followed Cook have crossed our sung tracks with their presence altering and changing forever our places of sacredness. Our truth still sings from these places, still naked, but pressured by the killing force of the muldarbi.

⁵¹ White, Lavina, FNICJ Transcript 1996, Vol 2: 111-112.

NAKEDNESS: THE COMING OF CLOTH

3.1. INTRODUCTION

When the rain comes
put down your glass
leave the flowers
and go into the marsh.
Let her winds find
you and the great gray
clouds roll down around
you.
Let the smoke fill up
your eyes and the mist
wet your breasts
then fling off your
last piece of colored cloth
that she may see
and take you.¹

My ancestors were naked peoples, and at some point in the history of humanity all our ancestors were naked. Our beginnings in kaldowinyeri were as naked as the law and the land. From birth the ancestors lived naked and in death their naked bodies were rolled in a woven grass mat, to be later buried.

There are no words that I have come across in our indigenous languages² to describe nakedness. Prior to the colonists' invasion of our territories there was no reflection of our nakedness. The reflection of nakedness came with the other, the clothed colonising peoples. Now there are few who physically walk the land naked. Those

who remain undressed of the modern world, and its views of law, time and space, are the few who still walk naked in the law. Most of humanity however has now forgotten how to be naked in law.

The coloniser - the bringer of cloth to Australia - through the use of coercion, rape, and violence dragged us into their world of dress and the covering of the naked body. By forcing the ancestors to be other than who they were, the colonisers did not apply law; instead they imposed theft and tyranny upon the indigenous law, its lands and peoples. As we were forced out of nakedness we moved away from living raw in the law.

Today most peoples inhabit a clothed, 'colonised' place - a place where the dominant legal system maintains a clothed state of being through its regime of rules and regulations. It is a place where law is no longer raw. Nakedness lies beneath the dress of colonial rules and regulations. Colonisation brought to an end raw law and nakedness as we knew, lived and felt it.

We had no traditional costume to identify and cover ourselves with. We were naked peoples. Nakedness was our identity and culture. What is our culture now? Still nakedness? Yes it is, but it lies suppressed beneath the covering layers of colonialism.

The dominant colonising culture has covered our being with its rules and regulations. It imposed a system that violated the law, and its peoples and lands. This was more

¹ Trask, Haunani-Kay, 1994:85.

than an act of dispossession of land; it was a dispossession of law, and the disposal of nakedness. Law, land and people now clothed by colonialism, nakedness is made illegal and the naked body is subject beneath layers of domination. The carriers of law await the time that is still coming where the covering layers will be peeled away: Kaldowinyeri or the beginning, the present and the future, as it has always been before the coming of cloth. A cycle is destined to begin again, when the muldarbi is dismantled, and we will again be naked.

In bringing the cloth the colonist also brought to us a reflection of our naked self. We came to know nakedness through the clothed body, and since that time, we have covered our raw and lawful being. The act of covering nakedness was not initially done as a shamed response, but rather a necessary act of survival against domination and the threat of violence. Early colonists used force wherever the ancestors protested or resisted by remaining naked. Now behaviour has been modified, the response is one of shame.

Nakedness awaits the time when the covering layers are peeled away, to be naked again. And the cycle and the beginning comes around, a circle, the song waiting to be sung.

² There were hundreds of Nunga languages spoken in this country we now call Australia.

3.2 Naked and invisible

In early colonial writings there are few references to our nakedness. It is as though we were never there; as though in being naked we were invisible to the coloniser. It was a surprise to me that little is written about the way the colonist felt when confronted by the naked bodies of indigenous women, men and children. Perhaps this void in commentary tells us something about the repressed sexuality and shamed attitudes early colonists possessed about nakedness.

We were made invisible by the colonists, and so was our connection to law and place. They did not see us, or their own creation - genocide. They made their role as perpetrators of the genocide invisible also. Invisibility was made legal by the *muldarbi terra nullius*. The illusion - invisibility of indigenous peoples, is a tool of the colonists and all others still today who seek to steal land and violate the law. bell hooks calls it 'white supremacy', the power to make black invisible, erasing all traces of subjectivity.³ Invisibility serves to marginalise all aspects of life which stand in the 'white supreme' way, the way of 'progress'. The idea of European superiority was based upon religious grounds or other metaphysical ideas of the "evolving spirit" as well as the idea of progress. This was contrasted with historical non-Europe and ideas of alienness, savagery, cruelty, cannibalism, deceitfulness, stupidity, cupidity, immodesty, dirtiness, disease, heathenness and so on. Nungas were 'so low' on the scale of evolution Europeans rendered us invisible.⁴

³ hooks, bell, 1995:35.

⁴ Blaut, J, M, 1993:50-61.

The muldarbi terra nullius, the erasure of the indigenous being, is an historical process, which continues today. While many commentators will argue terra nullius is no longer functional in the *Mabo (No2)*,⁵ the dynamics of the muldarbi live on.⁶ While the muldarbi-terra nullius, a colonial rule, no longer legitimises the ongoing genocide, it takes on other forms. The idea of extinguishment is one example which works in the same way terra nullius did in the past; making all that is indigenous invisible. Our invisibility continues. There is no visible public presence of our naked being (and minuscule visibility of our clothed being) to remind the other of our continuing presence in the face of genocide. And so it is we are vanished, invisible. In struggle to be.

3.3 The rugged cross and the ragged clothing

The old people ⁷talk of a time before trousers and after trousers. The bringing of cloth marked a point of radical change in indigenous history, history rooted in Kaldowinyeri.

When we became clothed, what did we become, as we came into the awareness and presence of the coloniser? Did we become more visible, with their reduced

⁵ The High Court in *Mabo v Queensland* (1992) 107 ALR 1:18, 28, per Brennan J, and at 82 per Deane and Gaudron JJ, and at 141, per Toohey J, declares its death relating to the property law of Australia. See also support for the idea that the judgement is a positive cancellation of terra nullius, Brennan, F, 1993:24-45, and Pearson, N, 1993:77-78.

⁶ See hooks, bell, 1995:36, for a further discussion on the impact of the legal apartheid in the United States and its ability to continue making invisible black Americans. The process hooks speaks of is one that translates to Australia.

⁷ Also referred to as indigenous elders, here I use the terms 'old people' and 'elders' in its indigenous context, meaning those who have grown in knowledge and wisdom and in their living of the law-ways, and not simply grown old.

embarrassment and shame of our nakedness? No. We still remained objects of their dominion. Other ways of seeing the naked indigenous self were imposed by the muldarbi colonialism. Our being became subjected beneath the rags of the coloniser.

The writings of early colonists expose their way of knowing and seeing us through a 'white supremacist'⁸ lens. The colonist 'knew' us as inferior, Loyd in 1846, wrote:

We saw a number of half-naked dusky savages...lounging down the street with spears and waddies in their hands, filthy and slimy and greasy, leaving behind them an odour enough to turn the stomach of the stoutest dog.⁹

Bull wrote in 1837 of a meeting between Governor Hindmarsh, newly arrived to the 'free settlement' of South Australia, and a group of Kaurna:

On the double party reaching the tents they were met by Governor Hindmarsh. There had been some anxiety about their fate. His Excellency expressed himself shocked that Mr. Stuart should have brought the naked black men amongst the tents of the numerous immigrants, and immediately called on Mr. Gilbert, the Government storekeeper, to supply the men with clothing, which being brought forth, some of the sailors, who were ashore from the Buffalo, took the natives in hand to dress and pet, pressing on them pipes and grog, which at the time the blacks declined, preferring sugar and fat pork; but alas! How soon they acquired a taste for the indulgences offered! The dressed-up black men displayed any-thing but comfort or content in their unaccustomed

⁸ A term used by bell hooks, see fn 3.

⁹ Loyd, E, 1846: 83-84.

array, which on becoming apparent, the Governor, on advice, was considerate enough to order blankets to be exchanged for the unpopular garments.¹⁰

From the earliest contact with the settlers the Kaurna people of the Adelaide plains were forced to cover their naked bodies, to not offend them. Blankets and clothing contaminated with the smallpox virus were provided for that purpose and also for purposes of genocide.¹¹ Under the pressure to cover nakedness many of our ancestors refused to conform and for this they suffered the consequences.

The German emigrant Listemann, in 1851 a settler to the Adelaide Hills records in his journal a time when the old people were threatened by incarceration for walking naked. He saw comedy in their attempts to cover nakedness. In my reflections however I see a situation where there was no choice; incarceration and humiliation were an inevitable consequence of colonisation:

They clothe themselves with a mat wrapped around their bodies and around the shoulders wear a sheep skin or a skillfully sewn rug made from opossum skins. In the vicinity of Adelaide, many wear pieces of European clothing which often give them a comical appearance. Thus I met a young beauty whose long cotton dress swept the dust for half an ell behind her, and a 'black dandy' seemed to enjoy his appearance in his finery consisting of white shirt, vest, cravat with collar and once-white gloves, just as much as our young gentlemen in their most elegant outfit. There is, by the way, a law that no

¹⁰ Bull, John, 1884: 36.

¹¹ For a further discussion of this early form of genocide see Butlin 1983:11-41, 63-70.

native may enter the city unclothed; any such intruders are immediately evicted by the constables.¹²

The *Adelaide Chronicle* in 1840 reported the people of the Murray region were coming into Adelaide to; ‘...ramble about our streets in a state of nudity,’¹³ The local paper the *Adelaide Examiner* in 1843, recommended;

some means should be taken to exclude the numbers from the streets, that now wander about in a state of nudity.¹⁴

The Protector of Aborigines Moorhouse, adopted the practice in Adelaide of ‘locking up the Natives for 24 hours.’¹⁵ Imprisonment was imposed without any formal hearing, for the colonialists it was a simple remedy, the clearing of the streets of naked black bodies.¹⁶

In correspondence between the Protector of Aborigines Moorehouse, and the Colonial Secretary he advised that;

The suggestions of locking up the Natives for 24 hours, if they are found wandering about town in a state of nudity, is in my opinion, good and lenient enough. It would tend greatly to check the indecent exposure which Mr. Teichelmann (missionary) mentioned in his letter. If the Natives continue to annoy the shopkeepers as much as they recently have done, I should decidedly

¹² Quoted in Arnold, B, 1988:4.

¹³ Cited in Pope, Alan, 1989:44, original source is from Correspondent to *Adelaide Chronicle* February 25, 1840.

¹⁴ *Ibid*, original source is from the *Adelaide Examiner*, editorial January 28 1843.

¹⁵ Cited in Pope, 1989:44, Protector of Aborigines correspondence, letter to Colonial Secretary, March 14 1842, SA Public Records Office CSO 39/1842.

¹⁶ *The Aborigines Protection Act 1886* (WA), created the rule for the removal of any ‘Aborigines’ ‘found loitering’ or who were not ‘decently clothed from neck to knee’, sections 43 and 45.

recommend the same punishment to be applied; it would shew them really that they must, in common with Europeans, be subjected to laws that ensure good behaviour. I have had the natives assembled and have translated to them the order of the Commissioner of Police.¹⁷

The new Police Commissioner Finniss, suspended the practice of incarceration without trial; 'naked Aborigines' were to be taken before a magistrate before being imprisoned.¹⁸ The courts however showed little tolerance, insisting that Aboriginal workers remain covered with blankets while undertaking physical work. *The South Australian* reported in 1843 that fines were imposed when several Aboriginal workers were;

brought before the magistrate, for going about naked in the centre of the city of Adelaide. They had been cutting wood or carrying water, and their employers had either requested or permitted them to put off their blankets for convenience of working.¹⁹

The ancestors were fined, and inevitably imprisoned for being the naked and the enslaved. It is this way of knowing us which we struggle against, in our journey to decolonise our minds, bodies, souls and spirits. To decolonise oneself is to become whole again. We work to decolonise our thoughts and the thinking which has been integrated, thinking that has resulted in our placement in the institutions of the

¹⁷ Cited in Pope, 1989:44. Protector of Aborigines correspondence to Colonial Secretary, 14th March 1842, in September that same year several Aboriginal people are reported charged under this regulation.

¹⁸ Clyne, R, 1987:86.

¹⁹ Cited in Pope 1989:45, the original report, from the *Southern Australian*, September 5, 1843

coloniser, their prisons, mental institutions and medical institutions - thinking that has made us invisible in a land that is ours.

3.4 Shame a form of extinguishment?

Judge Barron Field of the Supreme Court of NSW in 1825 commented on the old people who appeared before him;

Without faculties of reflection, judgement or foresight, they are incapable of civilisation. They are the only natives in the world who cannot feel or know that they are naked and they are not ashamed.²⁰

But what was and is still not realised, is that there was no shame. And the shame that was sought was in its seeker. Nakedness and the awareness of it came to the old people through the reflection of the other, and the other's shame.

In Adelaide Cawthorne wrote during 1844, about the Kaurna of the Adelaide Plains:

I took a walk amongst them who were in their wurlies, saw a collection of naked boys and girls, men and women, either entirely or half so. They are quite innocent in this respect and the women think nothing of (stalking) bolt upright in perfect nudity. Of course, this is not observed amongst themselves and it is only strangers who notice it.²¹

²⁰ Cited in Harris, J. 1990:32.

²¹ Foster, Robert, 1991:39.

Further on Cawthorne wrote:

Today taking a walk down on the banks of the river I resolved to cross, the natives being encamped on the other side, but finding the water deep in parts, so as not to wet my brik's, I was going back again - the natives seeing this sent one of their young girls across, in all her naked blessedness, to escort me over. The innocent creature obeyed with alacrity and took hold of my hand to lead me through, which I declined. What a scene I thought to myself, there I am, lone white, in the bed of a river and a naked virgin pointing me out the way, a few stray blacks in the distance. What pure innocence and where is the wretch who would take advantage. Such an act is the very way to raise the native character in my esteem. There is no false shame about them, all is pure and innocent, no false delicacy - the decency of the English is only another name for lewdness, it's false as Satan, as deceitful as the devil, and so on.²²

Not many early colonists shared Cawthorne's view. The colonial 'reality' of 'blackness', 'wildness', and 'backwardness', combined with nakedness to fuel ideas of white superiority. And through the force of white supremacy we become²³ 'shamed', erased, and extinguished, to the back blocks of Australia.

The christian story of creation reveals the thinking of early colonial settlers. The body naked was unknown while they lived in the garden. The following quote is taken from *Genesis* :

²² Ibid:54.

²³ Throughout the thesis you will find for example become and want to make it became for your normal reasons of correct gramma. I have deliberately left it unchanged, because I have written here as I would speak it and think it, that is I situate self in a place that is not past but now also and still coming. I have discussed these ideas more fully in chapter 1.

Now the serpent was more subtil than any beast of the field which the Lord God had made. And he said unto the woman, Yea, hath God said, Ye shall not eat of every tree of the garden?

And the woman said unto the serpent, We may eat of the fruit of the trees of the garden:

But the fruit of the tree which *is* in the midst of the garden, God hath said, Ye shall not eat of it, neither shall ye touch it, lest ye die.

And the serpent said unto the woman, Ye shall not surely die:

For God doth know that in the day ye eat therof, then your eyes shall be opened, and ye shall be as gods, knowing good and evil.

And when the woman saw that the tree *was* good for food, and that it *was* pleasant to the eyes, and a tree to be desired to make *one* wise, she took of the fruit therof, and did eat, and gave also unto her husband with her; and he did eat.

And the eyes of them both were opened, and they knew that they *were* naked; and they sewed fig leaves together, and made themselves aprons.

And they heard the voice of the Lord God walking in the garden in the cool of the day: and Adam and his wife hid themselves from the presence of the Lord God amongst the trees of his garden.

And the Lord God called unto Adam, and said unto him, Where *art* thou?

And he said, I heard thy voice in the garden, and I was afraid, because I *was* naked; and I hid myself.

And he said, Who told thee that thou *wast* naked? Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?

And the man said, The woman whom thou gavest *to be* with me, she gave me of the tree, and I did eat.

And the Lord God said unto the woman, What is this that thou hast done?

And the woman said, The serpent beguiled me, and I did eat.

And the Lord God said unto the serpent, Because thou hast done this thou *art* cursed above all cattle, and above every beast of the field; upon thy belly shalt thou go, and dust shalt thou eat all the days of thy life:

And I will put enmity between thee and the woman, and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise his heel.

Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire *shall be* to thy husband, and he shall rule over thee.

And unto Adam he said, Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life;

Thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field;

In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return.

And Adam called his wife's name Eve; because she was the mother of all living.

Unto Adam also and to his wife did the Lord God make coats of skins, and clothed them.

And the Lord God said, Behold, the man is become as one of us, to know good and evil: and now, lest he put forth his hand, and take also of the tree of life, and eat, and live for ever:

Therefore the Lord God sent him forth from the garden of Eden, to till the ground from whence he was taken.

So he drove out the man; and he placed at the east of the garden of Eden Cherubims, and a flaming sword which turned every way, to keep the way of the tree of life.²⁴

So their clothed history began. Eve and Adam, after they had eaten the apple, come to know their naked self. And when they become aware of their own individual nakedness, they come to know the self and from then on were no longer in the oneness, the rawness, or nakedness of the Creation. The awareness of being naked made them separate and apart from all other things in the garden. They were ordered to go forth by god from the garden of Eden, they left the natural world behind. A break with Creation led the way for man to go forth, multiply and dominate the earth. The story of the west and its justification for all they have done to the other, the other they saw naked still residing in our own gardens of creation. Can they become one again in the Creation? How could they do it? Can it simply be through the unknowing of their own naked self? To become one in creation? Their story continued, and Noah in his drunkenness did not see his own nakedness but his sons did and carried the 'burden'.²⁵:

²⁴ Genesis 3: 1-24, King James translation of the Bible. Blaut 1993:43, makes an interesting comment on the possible geographical sites for the Garden of Eden, the supposed place being the Caucasus Mountains, also the site of the supposed origin of the 'Caucasian race'.

3.5 Enter the church, exit naked

William Carey in 1792 wrote about Indigenous peoples as being; 'poor, barbarous, naked pagans'.²⁶ The wearing of clothing was fundamental to the early colonial and christian way of being. Early missionaries demanded the body be covered; nakedness was seen by them as being sexually permissive.²⁷

AND the Lord spake unto Moses, saying,

..NONE of you shall approach to any that is near of kin to him, to uncover *their* nakedness: I am the LORD.

The nakedness of thy father, or the nakedness of thy mother; shalt thou not uncover: she *is* thy mother; thou shalt not uncover her nakedness.²⁸

Missionaries carried the christian instructions both fearful and lustful of the nakedness they encountered when coming to our ruwe. Clothing was a prerequisite to being a christian, and Reverend Taplin, a missionary to the people of Pt McLeay wrote in 1873:

Our congregations at first were often strangely dressed. Some would be enveloped in the original opossum-skin rug. Some of the men would wear nothing but a double-blanket gathered on a stout string and hung round the neck cloakwise, others with nothing but a blue shirt on, others again with a woman's skirt or petticoat, the waist fastened round their necks and one arm

²⁵ Genesis 9: 18-28.

²⁶ Cited in Harris, J 1994:32, original source is William Carey, 1792: 3.

²⁷ Ibid:530-533, for a discussion on missionary attitudes to nakedness and sexuality.

out of a hole at the side; as to trousers, they were a luxury not often met with. To our horror and dismay one Sunday a tall savage stalked in and gravely sat down to worship with only a waistcoat and a high-crowned hat as his entire costume. Of course I sent him out quickly.²⁹

Taplin wrote in his Journal in 1859;

This horrid rite (ceremonial law) is much calculated to throw them back into barbarism, whatever good instruction they may have received in youth. Whatever sense of cleanliness, or love of European clothes may have been acquired is by this rite completely swept away. This custom must be done away with...I told all the blacks plainly this morning, that they obeyed the devil, and that Jehovah would send them to hell with the devil if they did not cease to obey him.

Nakedness was to be covered over by early missionaries, they viewed us as backward, barbaric, and heathen and by clothing us, the missionary had assisted us in taking a forward step in their understandings of evolution. Bishop Short writing in 1853 said:

Many young adult natives, who would have belonged to the most degraded portion of the human family, are now clothed and in their right minds sitting at the feet of Jesus.³⁰

²⁸ Leviticus 18:1, 6-7 and verses 8-19 describe a number of relationships prohibiting the uncovering of nakedness. See also for a discussion on nakedness in general and reference to the instructions to Moses, Ableman, Paul, 1982:34.

²⁹ Taplin, G, 1879:79. Neale Draper prepared a report in support of the women claiming secret sacred business in the Kumarangk area. In his evidence before *the Royal Commission into Hindmarsh Island* Transcript p4872, he discusses Taplin's stand against secret sacred rituals, 'in his drive to establish a mission and convert people from their own cultural beliefs to Christianity. The last of the initiation ceremonies that were recorded by white historians were held in 1882. These records say nothing about what they didn't know of the ceremonies that continued in secret.'

³⁰ Cited in Harris J, 1994:530-531, taken from Bishop Short to E Hawkins, SPCK. 14 February 1853.

Wiradjuri man Kevin Gilbert wrote about the way christian missionaries set about to indoctrinate and modify the behaviour of Aboriginal peoples through the separation of children from the old people,

The mission blacks were taught by missionaries to deny their 'animal nature'. Fundamentalist rectitude locked young blacks, male and female, in separate dormitories to save them from themselves. There they stayed, in these prison-like dormitories, at all times except in class hours or prayer meetings, until the youngsters were well past marriageable age and had been so indoctrinated against their 'unclothed heathen' brothers that they accepted their new lot in return, perhaps, for eventual salvation.³¹

Leaving nakedness to become clothed however did not alter or change the superior attitudes of whites towards indigenous peoples. Perhaps it was only christian sensibilities and embarrassment that were taken care of. The ancestors were treated as being outside the reality of the colonists, only becoming, a little bit real and visible when clothed in the dress of the colonist. And when dressed the colonists' embarrassment of the naked body began to subside. But their superior attitudes remained.

3.6 Dressing the law in rules and regulations

The colonial legal system comprises layers of 'man-made' rules and regulations. These are rules which have come into being, not through the creative process of song

but through a process which is to a large degree reliant upon the muldarbi - power and the force of arms - to maintain itself.

The colonists' own raw law has been covered over for centuries, by rules and regulations. Its naked body is no longer identifiable to them. Their raw law has faded from their minds, memory and imaginings. When it surfaces in us, it is looked upon by them as being uncivilised, not real law, but a mere custom of primitive peoples.

When Cook and the colonists who followed first invaded the shores of Australia they were dressed in military attire, and they applied their military rules and regulations, and began the genocidal process of dismantling our indigenous being. The military attire was followed by civilian dress and their 'common law', a law the coloniser intended to become common to us all. This was the 'real law', the only law. But it was not common to us, it violated our law. It violated itself also, through the failure of the colonisers to comply with their own rules and regulations. Despite two centuries of the imposed colonial legal system and its violations of raw law, the 'law', has lived on.

Our law was commonly known to the coloniser as myth, legend, or lore and was seen in the same way the old people were in their nakedness, as not really being people, likewise the law as not really law, but a set of customs of primitive peoples.

³¹ Gilbert, Kevin, 1994:6-7.

The High Court in its decision *Mabo (No2)*³² decided the colonial rule of terra nullius, that is a land empty of people, and law, was wrongly applied to Australia. Prior to this decision the rule of terra nullius underpinned Australian legal history for more than two centuries. Terra nullius made invisible that which was different. And today this same society whose court closed the door on terra nullius turns to open the door on extinguishment. Extinguishment, like terra nullius, will continue to erase and make invisible all which comes forward different, or naked again.

The dominant legal system raped its way into legitimacy, and took form as law, based upon the weight of its military attire and its ability, through force, to dominate all that was different or which failed to conform in the eyes of those who hold power. This is not law. Law is rooted in creation, it is a song, it is a love of law, and its land and its peoples. This muldarbi law works to erase peoples and their law.

In the decision of *Mabo No 2*, Justice Brennan J was careful to ensure no radical departure was made from the existing rules and regulations, when he decided:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency...Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure

³² *Mabo v The State of Queensland (1992)* 107 CLR 1, 6 of the judges Brennan J, McHugh J, Mason CJ, Deane J, Gaudron and Toohey JJ, (Dawson J) dissenting, held that the doctrine of 'terra nullius' as applied to Australia was a fiction that held no continuing place in the common law of Australia. This decision overruled *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia (1971)* 17 FLR 141.

would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own. The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed.³³

If they were to seek out this skeleton of principle, they would find that no skeleton existed. Instead they would find layers of rules and regulations, covering a mythical skeleton of legitimacy. A skeleton that was never there to begin with, itself invisible. Perhaps they have reflected their own lack of identity upon us, their own invisibility and the *muldarbi-terra nullius*, and perhaps 'the self is unknowable except by reflection'. Is it then, that in this process of unravelling history we have been the mirror for the other?

Your shadow at morning striding behind you

Or your shadow at evening rising to meet you;

I will show you fear in a handful of dust.³⁴

³³ Ibid p 30, Brennan J is not without Aboriginal support. Noel Pearson known for his prominence during the lengthy media debate on the *Mabo (No2)* decision and the subsequent *Native Title Act 1993*, during which he played a leading role in negotiations with the Commonwealth Keating government, has been a staunch crusader for the High Court decision. In *Yunupingu* 1997:151, he said, "I am a great believer in the imperative of those charged with developing the common law to redouble our efforts when injustice looms inevitable and unavoidable, to ever refine its rules and to strive to locate the justice and balance which frequently only remains to be found. This imperative remains as long as, to paraphrase His Honour Justice Brennan (as he then was) in the *Mabo (No 2)* decision, the skeleton of the common law, which gives it its internal logic and consistency, is not fractured.' Whereas Bird G 1996:104 argued that while 'the legal system is dressed up in the language of objectivity and neutrality, its 'skeletal framework' privileges white versions of history and legality.

³⁴ Eliot, TS, *The Waste Land*, cited in Suzuki, D, 1997:186.

The law is naked as it was from the first day. It still lives in the land as it has from the first day.

Chapter 4

WHO AM I?

4.1 INTRODUCTION

Because it is a systematic negation of the other person and a furious determination to deny the other person all attributes of humanity, colonialism forces the people it dominates to ask themselves the question constantly: 'In reality, who am I?'¹

Survivors rising from the killing fields have answered:

*Imbara I am-
Generation of Existence*

I am a living entity, you belong to me, I AM.
I am earth and space
I am a son of the world
I am the religious law
I am the kin to all creatures
I am kin to this creation
The world is my nation
The earth is my mother
The black man is of this earth
The red man is of this earth
And the yellow man of this earth
But where is the white mad man's home
He has rape in mind to his own mother earth
I have to fight with the trees
I have to fight with the rivers and rocks
Dear mother earth have my love
Day by day
Withdraw the force a companion pain of you, to be part of me
Please mother I'm sorry and lonely for your natural cause.
I am the birds dat die
I am the snakes dat die
I am the sea creatures to die
Sure man, we am but why must we bang and blast here on this

¹ Fanon, Frantz, 1966:203.

ground?
 I'm your native here in captive
 I'm your native ready in revolt
 I'm the native to bring all
 White human being to a new world
 Where you mother earth rule.
 I know you can just take so much.
 So I'm the land's sources of identity.
 You mother earth provides for my physical needs
 And my spiritual needs.
 You are the holy and sacred and I'm the regeneration
 Of history and the continuation of your life
 I'm the begin and dat where we all returns.²

Who am I now that I no longer walk the land naked? The being and spirit that I have always been. A being of the law. Only now I breathe less easily beneath the muldarbi layers.

I am born of the creation, a time before, here now and moving into. I am the grandmother's song, sung across the land, I am keeper of the Great Spirit of peace, a listener of the wind and the old people, the grandmothers and grandfathers who still speak the wisdom of the creation laws. I am a keeper of the song that comes to me in dreams and voices from the lands and waters.³ The messages are brought to me by my ngaitji.

I enter into a struggle to survive⁴ so that one may live again to sing the songs wanting to be sung. We who survive as the reflection of self, law, and ruwe, are violated daily. One has to undress⁵ from the images of rape and plunder to re-find a picture of self that is true to the ancestors. Our laws were broken and continue to be. The law

² Fogarty, Lionel, 1995:7.

³ Even Phillip Clarke, white 'expert' anthropologist, in giving evidence before the *Royal Commission into Hindmarsh Island*, spoke of knowledge coming in dreams, Royal Commission into Hindmarsh Island Transcript p 318.

⁴ We struggle to go beyond survival to live a good life like the ancestors before us, without worry of the muldarbi.

stopped being sung as the song holders fell to silence, as the path of genocide crisscrossed the land with the movements of the coloniser. It was she, the mother-earth,⁶ who carried us through the two centuries of ignorance, greed, rape and plunder, but this has not been without a price. Acts of violence and breaches of law have caused the hardening of our mother earth, a hardening that we work to soften through ceremony, language and law. In being Nunga, we struggle to be one in song and ceremony. It is a struggle to continue to carry our custodial obligations. For many the ruwe is badly damaged, and yet in these places, places of Tjilbruki,⁷ the spirit ancestor leaves his message, a message that lay in the land, a landscape which while becoming increasingly hardened by development is still alive in the spirit of Tjilbruki.⁸

I am a 'traditional' Nunga, a comment which flies in the face of most stereotypes of what is traditional.⁹ What is it I mean in saying that I am 'traditional'? The idea of tradition encompasses many different levels of Nunga law and culture. To be traditional is more than to be a 'full blooded Aboriginal', living in a remote region of

⁵ Or more commonly known as decolonise.

⁶ I dispute the claim that mother earth is a recent invention arising out of the colonised landscape. It is our reverence and love of her which is heightened at a time of when her own life is threatened. So we speak more of her: we try to communicate to those who do not know her so that they may learn to live with her and not in violation of her. See Swain 1991:3-26, for a discussion of what he calls the mother earth of recent invention, he argues the mother earth tradition is a response to the muldarbi. I disagree, the talk of mother earth is because she is under threat, similar to custodians of the Seven Sisters who are inspired to speak in a way that it not usual, but it is done because their ruwe is under threat. So in one sense the mother earth tradition is a response to the colonised landscape but it is also a tradition that has always been.

⁷ Much of the city of Adelaide and the suburban spread are built over the ruwe of Tjilbruki.

⁸ When the muldarbi come to our lands and chopped our heads from our bodies, removing our bones across the seas, placing them on shelves in museums, the song lay in the land. We are putting the bones of the ancestors to rest, for the ancestors to refind their place of song. It is the ceremonies that will begin the softening of the land.

⁹ The colonising state has constructed the boundaries of what is 'traditional', they have made popular the idea that being 'full-blooded' and/or living in a culture-context that is unaffected by colonialism means one is traditional. A myth in itself. Where in this country we now call Australia do you find Nungas who are unaffected by colonialism? See Pettman 1989:88, in reference to 'urban' Aboriginal women applying the identity of traditional. Swain 1993:178 states the 'traditional Aborigine' is an academic fiction.

this country, practising tradition and culture.. The impact of colonisation upon our lands has disrupted our culture and traditions; for example the roles of hunting and gathering are now being subverted by a supermarket or shopping mall culture. However tradition embraces other levels, beyond the physical stereotypes of what I am supposed to look, act and speak like. Tradition also lies within our spirit and soul life, where the kernel of my being remains 'traditional'. In these places traditional beliefs and practises continue in spite of the constant pressure to change and to develop and transform our ruwe.¹⁰

The work of anthropologists is largely responsible for the construction of traditional Aboriginal culture. They are the 'experts' who provide the state with the measure of what is 'tradition', and who is traditional. They measure and compare tradition, create lesser categories: of non-traditional Aborigines, rural Aborigines, urban Aborigines, categories they deem as being of a lesser quality, not authentic, not really a real Aborigine. In their analysis of the 'non-traditional' they want to make us like them, but the separation from the 'speaking land' is their own. I, like my ancestors before me, am still listening. I have never ceased to listen to the country talking to me, even though I am stereo-typed by Berndt in the following quote as falling prey to the assimilationist agenda.

Whether or not, or how far, we can contrast and compare Aboriginal traditional mythology with writing by people of Aboriginal descent today, is a difficult question. Differences between them are marked, not least in their views, emphases, directions and motivations. ...The nature of writing by many people of Aboriginal descent today, the kind of messages that are

¹⁰ See Pettman, Jan, 1992:24, for a discussion on the idea of 'tradition', and the impact of colonisation in the shaping of what is tradition.

conveyed, how they are transmitted, and for whom, all pose issues that differ from those appearing in the traditional mythology, either today or in the past. They are really different dimensions of meaning and operating. ...In the writing of Aborigines today, the voice of the speaking land, speaking in its diverse linguistic forms, has been muted. It can no longer, or only rarely, speak for itself through its own home-made media. Not only is its content radically different, so are its vocal expressions. Increasingly, it has slipped into an almost static, timeless entity, often something 'old', useful as a peg on which to hang an equally static and revamped Aboriginal heritage, designed for a purpose different from that it previously symbolised.These changed circumstances point to a crucial difference between traditional and neo-Aboriginal socio-cultural situations. Traditionally, the land was/is an independent substance, with a life of its own - dynamic and constantly renewing itself as a natural phenomenon, with a voice of its own that had to be heard by those Aborigines who were entirely dependent on it, irrevocably linked to it. The neo-Aboriginal view is of a land subjugated to socio-economic and political ends.¹¹

4.2 'This is my country, this is me'¹²

As a Nunga I am not contained by my body. We are the law, we are all things in the natural world, we are the ruwe and our ngaitji. They live inside of me as I live inside

¹¹ Berndt, R, and Berndt, C, 1989:426-427.

¹² A quote taken from a senior Anmatyerre law woman, who was responsible for a number of song cycles, and who passed away in 1996. In respect of law and culture her name is no longer spoken, and is replaced now with the name Kwementyai (meaning no name) Kngawarreye. She revealed to the world what you call art we call law.

of ruwe and my ngaitji. We are all things outside the body of humanity, our being is in law and land. It is the law which connects us to all things. My identity evolves from ruwe. In first meetings with other Nungas the protocol is to introduce one's self in relation to the country of the grandmothers and grandfathers, to identify where it is you come from and who your people, kin, and family are. It is one of our ways. Our relationship to country determines how we speak to one another, and who it is and how it is that we speak about ruwe and law.

Law is central to our identity as spiritual beings. The maintenance of law comes through the ceremony and the song; when the ceremonies were stopped by the muldarbi regulations which prohibited our ceremonial gatherings,¹³ the reflection of who we were dimmed. We have to look closely into the face of the land to see who we are. It is ruwe which has sustained us through the terror of invasion and colonisation, it has retained the body of law and culture to which we will all return, in one way or another.

In explaining our relationship to ruwe to non-Indigenous people when negotiating for protection from damage and destruction, we have had to use the language of the dominant colonising culture. In this process we attempt to translate our love for ruwe, an idea that has become alien to them for thousands of years. This thesis could have been written in the language of ruwe, and then translated into English; I have not been able to do this now, but where I am able to I have used the language of the land and

¹³ Similarly other governments outlawed ceremonial law practices of indigenous peoples. The Sundance in the United States was outlawed and practised under cover. Also in 1884 the Canadian government made it illegal for the First Nations to potlach, that is to pass on ownership and custodial obligations to territory in their traditional way, through the gifting ceremonies.

the ancestors.¹⁴ We are forced to communicate in the language of the dominant culture with very little thought given to the impact this has had on the maintenance of our culture and languages. When Wik elder Yunkaporta attended a synod conference in Brisbane to discuss the management of reserves, he found the synod divided along political lines on the issue of whether to agree to the hand-over of the administration of the Aurukun and Mornington Island missions to the State Government. Yunkaporta sat quietly while church leaders debated the fate of the Wik people, then he walked quietly to the podium and spoke in his traditional Wik dialect for about five minutes. Then he said, in English:

You all have been debating the future of my people as if you understand us, but I wonder if you do. I am speaking now in your language but did you understand when I spoke the words in my language?¹⁵

The coloniser, in the construction of our identity, 'established' that our law was merely mythical story, and our lands were unoccupied. The *krinkiri*¹⁶ named our land variously 'waste', 'crown lands', 'pastoral land', 'freehold' and now 'native title'. We knew the land, its name its story and its relationship to us, from *Kaldowinyeri*, from the beginning. The land was intimately known. Ruwe is a part of the totality of the song of the story. Always was, always will be. Sharon Venne when explaining the indigenous relationship to the land offered the following description;

¹⁴ Gaining a better knowledge of my own languages and speaking of the law in language, is a thesis in itself. In the November 1998 Federal Court *Miriuwung-Gajerrong* decision, language was used to come to an understanding of the law. I put a submission to the ARC in 1996, arguing what was later said in the above case, that is to know the law, you need to know the language of the country, but my application was refused. A pity, as I had this vision long before 'others' being white experts that the way to understanding the law was through an understanding of our languages.

¹⁵ The Sydney Morning Herald, Friday 6 November, 1998.

¹⁶ Name for white people, before the coming of the white man *krinkiri* is what we called the body of our deceased ones as it lay on the smoking burial platforms, the outer layer of skin peeled revealing the pinkness of the flesh. When they come to our shores we thought they were the ancestors returning to us. It was not a good omen.

When you have a table and it is covered with a cloth, beneath the cloth remains the table. No matter how many layers of cloth you place upon the table it will always remain that same table beneath the covering.¹⁷

The place of *Brukung*¹⁸ had imposed other title names on it by the muldarbi: a pastoral lease, mining lease, and a township. But it will always be *Brukung* meaning the place of 'hidden fire', where Tjilbruki came to finally rest and though the body of Tjilbruki has been partially destroyed through the mining of the pyrites for production of super phosphate,¹⁹ the spirit of Tjilbruki and his message will be forever alive in that place. Krinkiris may rename it many times but the essential nature and spirit of the place remains. And as Steven Possum of the Karajarri People said;

These people may own the land but it belongs to me. It will always be ours.

We worked on the station but it was still ours. The pastoral leases are just on top. The water and the trees and the animals still belong to us.²⁰

Similarly I remain who I am, beneath the layers of invasion, colonisation and rape. When the layers are peeled away, I am as I have always been, as I was from the first sunrise, a Nunga, a belonging being of the Creation.

We never cultivated the land. The relationship was being one with the land, an idea alien to those who live 'on', 'in' and not 'of' the land. Our relationship to land has always been irreconcilable to the western legal property law system.²¹

¹⁷ Personal communication to the author, July 1996.

¹⁸ The final resting place of the ancestor Tjirbruki, is the named township of Brukung in the Adelaide Hills.

¹⁹ The super phosphate was produced for fertiliser, and was spread extensively on the plains of the Karna People. They have now found that the use of this fertiliser has left traces of cadmium, and high pH leaving a toxic residue over lands used for agriculture. The destruction of the body of Tjirbruki, brings its own pay-back to those who mined the body of Tjirbruki.

I am of the Creation. I am not a piece of meat that can be bought or sold, neither is my ruwe. The land is not for sale, transfer, lease or loan, the ruwe is also boss for itself, speaking its own voice.

4.3 The story - song is who we are

There are understandings similar to our law – ways amongst other indigenous peoples that exist throughout the world. The following are the thoughts of an indigenous sister from Great Turtle Island:²²

In the Beginning were the Instructions. We were to have compassion for one another, to live and work together, to depend upon one another for support. We were told we were all related and interconnected with each other. Now people call our Instructions legends because they were given as stories. But to the Indian people, that was like a reality at some point in history. So most of the Indian nations that we know of, they have their own story of where they began. Some will tell you they came from the sky, from the stars. Some will say they emerged from the earth or they emerged from a lake as a people. In that emerging, it's almost like they were choosing their language, choosing dress style, songs, their dances.²³

²⁰ The Australian Weekend Magazine, October 10-11 1998:44.

²¹ See Motha, Stewart, 1998:82-83, where he argues that the High Court in *Mabo (No 2)* failed to recognise difference but instead retained sameness, in their construction of native title so as to fit within a western property paradigm. See also Brennan J at *Mabo (No 2)* 175 CLR 1:51,

²² More commonly known through its history of colonialism as the United States of America.

²³ Downey, V, 1993:2.

Our songs and stories gave us knowledge for survival, to live a good life in harmony with all things. The song law passed from one generation to the next and was taken on by each generation as an obligation and commitment to the spirit ancestors. The original agreements entered into are still alive, as are the obligations to honour them. The obligations are the basis of who I am. I live in a reality of both physical and spiritual perceptions of the world, taught by the old people to know that the physical and spirit realm is one. This is the law. All is one. To speak of spiritual identity is an affirmation of the whole of one's self, and of its own volition is an act of resistance to the colonisers' way of being and seeing.²⁴ I am more than flesh, I am spirit, and that will never die, death is only in the minds of those eaten by the muldarbi.

When the ancestors sang the first songs of law, the different peoples were given identity of ruwe/place. And as we sat within the circle of song we were given our language names, an identity of self within the collective order of peoples and ruwe/place. This time of Creation law is time now, created then to grow and live now. The law shapes my identity: it lives within me, (as it does in all other peoples, either consciously or unconsciously).

4.4 Anthropology

Anthropology lives in the camp of the muldarbi. It was used by the muldarbi to gather information about Nungas, information that was of benefit to the colonising process. The information gathered related to our native legal systems, land tenure

²⁴ For a further discussion on identity and the forces which shape it see hooks bell 1989:109.

rules, social, political and economic organisation. Information gathered was from a European point of view, a study of 'us' the native.²⁵

Anthropologists construct the identities of many indigenous peoples from a place of genocide and domination, as the 'experts' their methods are 'known' as 'scientific', objective, without any emotion or romantic bullshit. They have the real outsider story on us. The view of the anthropologist is tested. It is 'known' to be more reliable than our stories about ourselves, ones which are too 'inside the story', not objective and sufficiently distant from the subject being studied to be a reliable source of 'data'. Their views prevail over ours; they are employed by colonial institutions that name us, as they have from their own beginnings, and we are left to work with this, sifting the sand to find the kernel of our lives. Each one of us studied by anthropologists, is the carrier of the seed that they seek to study: to absorb, understand, compare, analyse, and measure for authenticity. The thing is that we are immeasurable and they are left reflecting upon their own loss, and inability to unknow nakedness. The following quote from MacKinnon lends support to the position I have taken against science, that is of science being the objective measure of all that is 'known'. A position that renders my own insider knowledge of the self as too subjective and unreliable as a source of information.

It is said that thus speaking from the inside runs the risk of not being compelling to those who are not already convinced. This may be because much prior theory has adopted the position of dominance and needed to disguise that fact to support the illusion that it was speaking for everyone.

²⁵ See Blaut, 1993:23-24 for a discussion on the business of diffusing Europe to non-Europe.

Whatever its disabilities, speaking from the position of subordination does not have this one.²⁶

Is there a role for anthropology? Trask argues no:

They must come, as American Indians suggested long ago, to understand the land. Not in the Western way, but in the indigenous way, the way of living within and protecting the bond between people and aina.²⁷ This bond is cultural, and it can be understood only culturally. But because the West has lost any cultural understanding of the bond between people and land, it is not possible to know this connection through Western culture. This means that the history of indigenous people cannot be written from within Western culture. Such a story is merely the West's story of itself.²⁸

And further on Trask continues;

While Hawaiians suffer this colonial yoke, anthropologists deny the very methodology of their work is exploitative. To Native peoples, anthropology is based on a peculiarly Western belief that studying books and learning to do field work bequeaths a right to go halfway round the world to live with, observe, and write about another people. Moreover, this exploitation of a people's hospitality and generosity does not carry with it any responsibility of repayment in kind, or of privilege and privacy. At some time in their professional lives, anthropologists live with Natives who are in struggle, dispossessed and, in some cases, endangered. But in the interests of

²⁶ MacKinnon, Catharine, 1989: XV1.

²⁷ Means land.

knowledge or science or some other abstraction, the anthropologist has no obligation to aid the people he or she studies, to withhold information which threatens the people or is considered sacred or privileged to them, or to be a part of their struggles, whatever they may be. In other words, the anthropologist is a taker and a user.²⁹

Do anthropologists have a duty to those they have studied? For example a duty to spell out their practice, and to describe the consequences of the writing and research which they are doing?³⁰ A question posed by Eric Michaels, who then asked the further question of his peers, 'can we justify placing a bell jar over a culture?'³¹

Anthropologists name us, they determine authenticity or otherwise, they are empowered and mandated by colonialism. They argue amongst themselves as to who has the right way of knowing us. In the ruwe of my ancestors the Berndts and Norman Tindale all claimed to have the authentic picture, later others also lay the same claim.³² Anthropologists categorise informants according to their perception of authentic 'natives'.³³ David Unaipon, a famous Nunga scholar and inventor was seen as losing his authenticity when he become too educated, and christian. The Berndts commented on the writings of Unaipon as being removed from his own well of Nunganness.³⁴ As though becoming knowledgeable in another culture extinguished his

²⁸ Trask, H, 1993:157.

²⁹ Ibid, 1993:166.

³⁰ Michaels, Eric, 1994:128.

³¹ Ibid:130.

³² Phillip Clarke and Phillip Jones were called as expert witnesses on the culture of the Lower Murray and Coorong regions at the Royal Commission into Hindmarsh Island.

³³ Bell, Diane, 1998:126.

³⁴ Unaipon records the story of the Seven Sisters and their travel to the Lakes, Hemming in personal communication thinks his source was Annie Rankine. Unaipon's stories were taken and recorded by others. Mountford 1989:52, records an account of the Seven Sisters at the Lakes, the source here is most likely Unaipon.

culture of birth. The same test could be applied to anthropologists, that is when they have become so steeped in the culture of the 'other' do they also become so removed that they are no longer authentic in their British, Australian or Americanness. Is it assumed as it is for us that they have extinguished their 'authentic' identity entirely? When we journey into the white world, into education or employment, we are deemed assimilated, extinguished from our Nunganness, but when a white anthropologist becomes absorbed in our life, laws, culture and stories, they are scientists, always remaining white, never at risk of losing it.

Anthropologists in their hunt and gather for the authentic native, construct identities and favoured 'informants'. Dianne Bell is critical of the Berndts for their methods of gathering 'data' but she also commits a similar offence. In her construction of a Ngarrindjeri identity, Bell has set apart some of her informants as knowing more than others; 'because they know things others did not.'³⁵ Are we to assume that Bell knows all there is to know? How does she know that they know more than others? Or that others with knowledge may not have wanted to discuss the business of women or other issues of culture and tradition with her, which is the way of our old people?

Milerum, Karloan, and Pinkie Mack were valued 'informants' because they knew things others did not. This is why they were sought out. There are few who would question the authenticity of these voices.³⁶

This construction of those who know conjures power for the creators and those they have created.³⁷ I am not debasing the knowledge of Karloan, Milerum, and Pinkie

³⁵ Bell, Diane, 1998:455.

³⁶ Ibid:455.

³⁷ Ibid:468 commits the same offence as the Berndts, Tindale, and others when she writes, 'The blood lines running through Pinkie Mack, Koomi Wilson, the Kropinyeris and Kartinyeris are well attested in

Mack for they are individuals I revere also, but I am disputing the place they have been put in, that is rarefied, like the contemporary exotic, that no other is able to attain. There were others like them. Perhaps their invisibility is the result of the choice they made, and that is not to speak. Nungas frequently choose not to speak and not to disclose the sacredness of our laws and culture.

I do not dispute the work of Bell which is the recording of women's business and law in the region known as Ngarrindjeri; I simply assert that it is much more complex than what Bell has us looking at.³⁸ In the construction of a Ngarrindjeri culture 'informants' are gathered together to create a picture of what is Ngarrindjeri and throughout the texts of both Tindale and Berndt it is clear that there are different and conflicting views, particularly between their informants Milerum and Karloan. (Neither of them identify as Ngarrindjeri, but as Tanganekald – Tatiara, and Yaraldi.) So why do these anthropologists continue to construct the identity of this region as Ngarrindjeri? The culture and laws of the different groups were not homogeneous; there was difference. Pinkie Mack had knowledge for her region, the Lower Murray, but her knowledge is translated to be representative broadly of Ngarrindjeri, covering the Lower River Murray Lakes and Coorong, a region that is in fact full of diversity.

Anthropologists construct identities for us, identities which obliterate ancient knowledge held in the collective memories of Nungas. The identities they construct become the master text of who we are, who is 'traditional', when 'tradition' ceases, who is authentic and 'native' enough to enter into the 'native title' processes. They

the written record, but not the content of the stories. These are the authorities.' I do not dispute the naming of these families but rather the way in which Bell chooses to name, as though she has the power to name those who know.

have the power of god, the power to create and the power to take life. They can unmake and make our identity as 'traditional' native. They are also like the police. They are empowered to police our culture, and laws. Then they become the examiners, grading culture and laws in accordance with their own perceptions of tradition.

Throughout the world Nungas are in constant conflict with trans-national corporations proposing developments which would damage or destroy the land. Frequently anthropologists and government experts attack us when we speak of the sacredness of the land; we are accused of inventing the idea of sacredness.³⁹ The anthropologist Jocelyn Linnekin has claimed that Hawaiians have 'invented' 'what they claim is a traditional value of love and caring for the land.' She refers to this value, called *aloha aina or malama aina*, as a 'slogan' used by Hawaiians to stop military bombing of Kaho'olawe, rather than a real cultural value. Linnekin refers to the return to Hawaiiness as Hawaiian nationalism and portrays the journey of Hawaiians as mere invention:

With the dominant society's categorization of native Hawaiians as an ethnic group, and with the rise of Hawaiian nationalism, Kanae villagers have become increasingly aware of the political import of their identity.the nationalists espouse "aloha aina", and some of the people on the land lend their knowledge of "authentic" tradition to the cause. The young men who occupied Kahoolawe subsisted as much as possible on gathered foods, thus living an image of Hawaiians as people who make their livelihood from the

³⁸ The complexity of different views and how they have been accommodated into the written word is illustrated in Bell, Diane, 1998:550.

land and the sea. This image has not been true of most Hawaiians since the latter half of the 19th century. Today's country dwellers are wage laborers who grow and market taro to supplement their salaries. Yet Keanae villagers see themselves as living a 'traditional' life, and according to the modern meaning of Hawaiian tradition, they do. For both urban nationalists and the rural folk, tradition is objectified and thus invented. As experts in authenticity, anthropologists, too may be enlisted in the process of defining tradition. But the hostility between the Hokulea's Hawaiian crew and the haole sponsors demonstrates that anthropologists and nationalists usually pursue different versions of the 'real' tradition.⁴⁰

However Trask argues that throughout the impact of colonialism Hawaiians have maintained the tradition of caring for country:

What Linnekin has missed here - partly because she has an incomplete grasp of 'traditional' values but also because she doesn't understand and thus misapprehends Hawaiian cultural nationalism - is simply this: the Hawaiian relationship to land has persisted into the present. What has changed is ownership and use of the land (from collective use by Hawaiians for subsistence to private use by haole and other non-Natives for profit). Asserting the Hawaiian relationship in this changed context results in politicization. Thus, Hawaiians assert a 'traditional' relationship to the land not for political ends, as Linnekin argues, but because they continue to believe

³⁹ Invention of tradition; is used in a broad, but not imprecise sense. It includes both 'traditions' actually invented, constructed and formally instituted and those emerging in a less easily traceable manner within a brief and dateable period.

⁴⁰ Linnekin, Jocelyn, 1983:249, haole means foreigner.

in the cultural value of caring for the land. That land use now contested makes such a belief political.⁴¹

The recent dispute over the building of a bridge to Kumarangk,⁴² illustrated the power of the state to intrude into the discussion and determination of our cultural and spiritual identity. The dispute also illustrated the continuity of the Nungas to speak in the voice of the ancestors on law and culture. The women of Kumarangk said: we are the carriers of secret sacred women's law business, and we still honour this after more than 200 years of colonialism. The state said: 'you are lying'. The Royal Commission into Hindmarsh Island decided secret sacred women's law business was fabricated to stop the building of the bridge. Phillip Clarke the 'expert' on Ngarrindjeri culture gave evidence before the state inquiry similar to the arguments of Linnekin:

Q You are saying that the concept of secret sacred women's business on Hindmarsh Island was formulated-...in April 1994 or thereabouts.

A Yes, I am saying that.

Q But you are saying that that is something that has - occurred by way of a process of invention of tradition.

A Yes, that's a convenient way of describing it

⁴¹ Trask, H, 1993:167, and 168-169 for a discussion on the term used by anthropologists 'invention of tradition', it has been argued by anthropologists that indigenous peoples deep love of the land and our reverence for the land as our mother is viewed as a response to colonialism and its destructive impact upon the earth. And is merely a recent invention and not an ancient tradition or concept that we held.

⁴² Kumarangk is our name for the place the state has named Hindmarsh Island, named after an early colonial Governor. The state of South Australia gave approval for the building of a bridge from mainland Goolwa to Hindmarsh Island. Ngarrindjeri miminis (women) opposed the building of the bridge, because it would interfere with women's law business. The state accused the women of fabricating women's business; its connection to the site and to Ngarrindjeri women's identity. The state created the Royal Commission to establish the 'truth', to find out if the women had fabricated women's law-business.

- Q I am simply putting to you that the forces behind the formulation must have been acquired over a period of time. It just doesn't happen in a vacuum
- A Nothing ever happens in a vacuum, but there are various influences out there and people can selectively use those influences to push a particular political line. I mean, that happens all the time.⁴³

The issue of invention of tradition was discussed at length during the inquiry,⁴⁴ In giving evidence Clarke spoke of invention of tradition as being a:

cultural process whereby events are reshaped, the perception of the past is reshaped to make a new sense of the present. So it is –in cultural terms, it is a manufacture.⁴⁵

This picture was not shared, both Dr Fergie, and Hemming argued that where there are more than 35 women claiming to believe in women's business, than it clearly outweighs the idea of invention.⁴⁶

Clarke fails to understand that our past is always with us, and that we have retained our cultural and spiritual beliefs, throughout the colonising processes.⁴⁷ Clarke the 'expert' is engaged in his own creative process of constructing and inventing a Ngarrindjeri identity. The inquiry never heard the evidence from the women about

⁴³ Cross examination of Phillip Clarke, by Ms Pyke Hindmarsh Island Royal Commission Transcript p3711.

⁴⁴ See Transcript, pp 3704-3705, and at pp 3709-3711 and at p 242, where he gives evidence of Steve Hemming supporting his model of 'invention of tradition.' However Hemming concludes that the elderly women knew enough about the women's business to satisfy him that there was truth in the claim of women's business.

⁴⁵ Hindmarsh Island Royal Commission Transcript, p243.

⁴⁶ Ibid: 249-250, and pp314-315.

⁴⁷ See evidence of Clarke, in the Royal Commission into Hindmarsh Island, Transcript, p35550-3552, and also Jones at p 4272, and his cynical reference to the new ageism and Goddess religions, as being an influence over the Ngarrindjeri women.

restricted womens' business, evidence that may have led them to a clearer understanding of our culture and laws.⁴⁸

4.5 The krinkri construction of Nunga identity and culture

Whatever they say about us and define us as beneath the cover of colonialism, we are still 'matha wai'⁴⁹ of the grandmothers' and grandfathers' ruwe. When the muldarbi imposed its names, they did not know ours. We spoke different languages, a fact the colonists ignored; for more than two hundred years the colonial state by way of force has imposed its own idea of who we are. They were blind to our presence. At first we did not exist,⁵⁰ and when we did exist we were other than our selves. The coloniser called those who dressed in clothing and 'behaved properly', British subjects; we were to become subjects, but without the same 'rights' as other British subjects.⁵¹ Later, before a populace which called itself Australians they called us that too. Colonial-schizophrenia ran amok in the construction of our identity. They also called us 'Aborigines', 'the Aborigines' and 'our Aborigines' and they still do. It is a struggle to hold a Nunga perspective against state intrusions which impose their

⁴⁸ The inquiry did however hear evidence in support of restricted womens' business, from Hemming and Draper, see Royal Commission into Hindmarsh Island Transcript, pp4874-4876 and pp 4878-4879.

⁴⁹ Means boss and used in its Nunga context matha wai means the one who is responsible for the ruwe, not so much a power or lord of the manor idea, but a responsibility of a care-giver to the country and kin. I also note that the spelling of matha wai may be spelt differently and that will be determined by the speaker and the different ways it is spoken.

⁵⁰ We were vanished by the doctrine of terra nullius.

⁵¹ The rights discourse is applied universally to indigenous peoples. Trask 1993:112 refers to the civil rights talk in the US, as being a term that is without a realised meaning. Trask goes on to say at 113-114 'Full American citizenship, ie full American "rights", thus accelerated the de-Hawaiianization begun with the theft of our government, lands, and language in the 1890's.' Likewise for us, the imposed status 'British' was meaningless, we were treated more like children or 'wards of the state', while they took control of our land and most aspects of our life. See also Chesterman, J and Galligan, B, 1997:41-42.

constructed identity on us.⁵² So we question: by what right does the Australian state impose itself on us, like a rapist, presiding over our ancient timeless relationship to ruwe, to name who we are?

And all the time they were telling us who we were, our old people were telling us we were not those British subjects. Therefore they separated us from our old people and their ancient law-ways. And through torture and terror,⁵³ they colonised the peoples' minds and many of them let go of or forgot who they were. But there are those who remember and continue to remind us of our teachings and ancient law-ways.⁵⁴

Indigenous historian Haunani Trask speaks of the impact colonialism has on the naming of indigenous peoples:

Because of colonisation, the question of who defines what is native, and even who is defined as native has been taken away from native peoples by western-trained scholars, government officials, and other technicians. This theft in itself testifies to the pervasive power of colonialism and explains why self-identity by natives of who and what they are elicits such strenuous and sometimes vicious denials by the dominant culture.⁵⁵

I am of a sovereign people, and for the time before Cook we were known by our ancient names, some which have struggled to survive today. The muldarbi with its

⁵² See Pettman for a discussion on how the state controls who is included and excluded from Aboriginality, Pettman, J, 1992:20. Colonialism imposed itself over the top of our authentic and traditional identities, it processed other ways of naming us, in the violence of invasion and genocide. For a discussion on these different categories see Pettman, J, 1992:1.

⁵³ Further discussion on how the state has inflicted torture on Nungas see Cunneen, Chris, 1996:13.

⁵⁴ My mother is my elder and constant reminder of who I am, ensuring I never deviate from the track, others are Georgina Williams, Kevin Gilbert, Kevin Buzzacott, to name a few and all of my elders now passed on to another place.

power of force annihilated our right to name who is Nunga. My ancestors have never consented to the theft of our ruwe or the genocidal practices against us by the state and the states assumed right to name who we are. The British claim to sovereignty over our ruwe and our selves is based on muldarbi desires; it is a process that is killing of law. The law continues its life under the cover and impact of the muldarbi – colonialism. Our ability to live a naked life singing up the laws of country is carried in a struggle to be under the layers of oppression, the years of invasion, colonisation, ethnocide and genocide. To be my whole self - physical and spiritual I must be constantly working to decolonise⁵⁶ my mind, peeling away the layers of thought imposed by those who dominate the physical world.

In the recent Federal Court decision *Edwina Shaw and Ors v Charles Wolf and Ors (1998)*,⁵⁷ the court maintained the muldarbi right to name who we are. The court required proof of bloodline and self-identification. In this decision the court reviewed the Aboriginality of some of the elected members to the regional council for the Aboriginal and Torres Strait Islander Commission (ATSIC). Merkel J held that two of the eleven elected members were unable to prove their Aboriginality. Our identity is contained through the calling up of genealogies. The state asserts and administers their right to test and control the process of determining who it is we are.

It is also a process that can be found on a community level ‘out there’ in every day encounters between Nungas and non-indigenous peoples. Nungas are constantly required to demonstrate who we are and how we are it. We are asked questions about

⁵⁵ Trask, H, K, 1993:54.

⁵⁶ For further analysis of the term and its application to Hawaiians see Trask H, 1993:115, the muldarbi prefers to use terms like, culture revival, or regeneration of culture in preference to using the term

why we look the way we do, what is our culture and language, and many other questions all equally related to a particular constructed stereotype of who is a Nunga in popular mainstream culture. Never are the questions turned inward, and the questioner asked to reflect on whether they are the particular stereotyped identity that they identify as.

I call myself nunga mimini⁵⁸ of the Tanganekald, and Meintangk peoples.⁵⁹ Gunyas⁶⁰ call me indigenous, Aborigine,⁶¹ and Aboriginal.⁶² They have also called me heathen, native, British subject, Australian citizen, ethnic-minority, half-caste, black-white, detribalised, euro-Aboriginal,⁶³ which I do not answer to. And in the face of this I affirm my naked self and spirit being.⁶⁴

decolonise, because these other terms have no political or legal context. They are terms that have no more meaning than to regenerate a native forest of its flora and fauna. See Margaret Davies, 1998:155.⁵⁷ (1998) 561 FCA (28 May 1998).

⁵⁸ Means women.

⁵⁹ This is an identity which I have grown up with. Clarke in the *Royal Commission into Hindmarsh Island* Transcript p 3748 refers to an elder of the Coorong who like my old people did not identify as a Ngarrindjeri. These views are in conflict with those who identify as Ngarrindjeri as they claim the ruwe of my grandmother as Ngarrindjeri country. My old people never identified as Ngarrindjeri, this was an identity which was claimed by those who lived on Pt McLeay now known by its old name Raukkan.

⁶⁰ Means non-indigenous.

⁶¹ Aborigine: a Latin word meaning 'from the beginning', " 'Aborigines' are groups which, in relation to the territory they inhabit, came 'first' – in other words they have a significantly longer history of connection with the territory than any other group or people with claims over it. An aboriginal group can be described as a group with a distinctive identity discordant with, but prior in time to, the community and law of the state within which they live.' Crawford, James, 1987: 7. Aborigine is a word that carries negative stereotypes, for example being backward, primitive, exotic etc. Legislative definitions of Aborigine have evolved throughout Australian legal history. In 1934 the SA *Aborigines Act* amended the earlier *Aborigines Act of 1911*. The definition of an 'Aboriginal person' in section 5 included anyone 'descended from the original inhabitants of Australia'; the application of the Act was to have a far greater reach. The current Commonwealth of Australia definition of Aborigine, includes the following three criteria: one descent, two identification and three Aboriginal community acceptance and acknowledgment. It was these three criteria that the court in *Edwina Shaw & Anor v Charles Wolf & Ors [1998] 561 FCA (28 May 1998)* approached the test for Aboriginality.

⁶² Aboriginal is defined by the Commonwealth in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s3 (1) as meaning 'a member of the Aboriginal race of Australia' and including 'a descendant of the indigenous inhabitants of the Torres Strait Islands'.

⁶³ Euro-Aboriginal was a description used by Senator Lightfoot, during a debate on the *Native Title Amendment Bill 1997*, in the Australian Senate on 25th November 1997.

⁶⁴ Bird, Greta, 1996:103, writes about the naming and defining of us; 'Kooris is a word from the indigenous Australian languages used in South Eastern Australia meaning 'ourselves'. Because I am writing in South East Australia, on many occasions I have used the word Koori. ...as a substitute for 'Aborigine'/'Aboriginal;' which have been imposed on the indigenous Australian peoples since white

My identity grows from Kaldowinyeri, travelling through a history of song and stories told.⁶⁵ However asserting my Tanganekald and Meintangk identity in this time of the muldarbi creates conflict with the muldarbi, as my ancient identity challenges the muldarbi's unlawful possession of my country. My identity is also cause for conflict with the 'Ngarrindjeri', who claim to speak for the ruwe of my grandmothers. So who is who, and who is really real, and who says so?⁶⁶ The records used as a basis for supporting the Ngarrindjeri identity rely on information that originates from persons who never identified as Ngarrindjeri. One recent example is provided by Dianne Bell who spoke of Reuben Walker as being a knowledgeable informant for the ethnographer Norman Tindale during the 1930s, but Walker identified with his mother's people who were Ramindjeri. Milerum, also an informant of Norman Tindale, identifies his father's people as being Tanganekald and his mother's people as Tatiara. Also Albert Karloan, the main informant of the Berndts, during their field-work in the 1940s at Murray Bridge, identified as a Yaraldi. None of these prominent identities spoke of themselves as being Ngarrindjeri. Normally out of respect for the privacy of families I would not refer to family genealogies, I break this protocol in this instance to make the point regarding the issues surrounding Ngarrindjeri identity. In an attempt to foster the Ngarrindjeri identity Diane Bell claims distinct peoples as being clan identities of the Ngarrindjeri.⁶⁷ The construction of Ngarrindjeri identity is a post invasion creation, a colonial construction that has the

invasion, and which are generic words meaning the 'original inhabitants' of any area of planet Earth. As such, these words are evidence of a failure to name, and are linked to the politico-legal doctrine of terra nullius. In theory, terra nullius was extinguished by the judgement in *Mabo (No 2)*, but in practice terra nullius survives and continues to support the neo-colonial state.'

⁶⁵ My grandmothers 'come' from a place called Tangglun, otherwise named by the coloniser Kingston SE. The country is of the Tangane, or Tangani, or the Tanganekald, all have the same meaning. Tangglun means the boundary or the end place of the Tangane language. This information was given to Tindale, Norman, 1934-7:41-42, by my great grandmother, Amy Gibson.

⁶⁶ The place of my ancestors has been described as being within the territory of the Ngarrindjeri, but we called it differently by its creation names. Even Berndt refers to the South-East region as Milipi country, Berndt 1993:118.

potential to erode and finally obliterate the ancient names of the Lower Murray, Coorong and South-East region. The term Narrinyeri was the ancient name of the people who lived close to Raukkan, also known of as Pt McLeay. It has been argued by many of the old people that the word 'Ngarrindjeri' meant all Aboriginal people.⁶⁸ The word Narrinyeri was recorded by Norman Tindale as deriving from the word Kornarrinyeri, meaning belonging to men. The name Narrinyeri I have found was used in a written reference by the missionary Meyer and was applied more generally by the missionary George Taplin. Rev Taplin named the entire river, lakes and Coorong Peoples who had come to reside at the Point McLeay Mission as Narrinyeri. Anthropologist Radcliffe-Brown in 1930 also used the phrase "Narrinyeri group". In employing their power to name us they identified the distinct peoples (having different languages and cultures): the Yaraldi or the Jarildekald, Tanganalun or Tanganekald, Portaulun, and Ngaraltu or Ngaralta and Ramindjeri as being Ngarrindjeri.⁶⁹ Ngarrindjeri is now popularly accepted to embrace and include all groups from the River Murray region through to the lower South-East, leaving old names disused and in danger of becoming extinguished. Earlier researchers Tindale and Berndt distinguished between the Yaraldi and the Tangane; neither used Ngarrindjeri as a final construction for identity. Berndt employed Yaraldi to describe the people of the Lower River Murray region, and Tindale used the term Tanganekald to identify the Coorong People.⁷⁰

⁶⁷ Bell, Dianne, 1998:549, refers to the Ramindjeri of Encounter Bay, the Tangani (Tanganekald) of the Coorong and Yaraldi of the Lakes and River Murray as being clans of the Ngarrindjeri.

⁶⁸ See Phillip Clarke, in the *Royal Commission into Hindmarsh Island* Transcript p 3748, where he refers to a person (an elderly aunt of mine) 'who had very strong connections with the South-East and Victorian region as well, but saw themselves as – this particular person used to argue that 'Ngarrindjeri' meant all Aboriginal people, and she preferred to use a descent clan name which related to part of the Coorong to define herself.' What Clarke calls clan name, are in fact language groups more reflective of a distinct people and cultural group.

⁶⁹ Tindale once said that 'Old names never die', Tindale 1974:157. For further discussion see Dianne Bell, 1998:420.

⁷⁰ See Michaels, Eric, 1994:175, where he discusses the work of Sally Morgan of *My Place*, and Bruce Chatwin, author of *Songlines*, Michaels discusses the work of these two authors and argues that their

Language is one of the signifiers or bases of identity. Tangane and Yaraldi were distinct language groups. The Ngarrindjeri language appears to be a compilation of the different groups, being Yaraldi, Tangane, and Ramindjeri, amongst others. The impact of invasion and genocide drastically reduced the numbers of language speakers of each nation, survivors were rounded up and detained by the muldarbi at their 'feeding stations', our ancient identities began to crumble and submerge, becoming what the missionaries who had become our 'carers' named us to be. The genocide provided an impetus for the different language groups of the old people to combine into a language the missionaries named Ngarrindjeri.

The different language groups and traditional identities of our ancestors had already formed before the arrival of Ngurunderi.⁷¹ Our language was birthed from the body of Wururi, a female huntsman spider.

Wururi is said to have roamed about at night, scattering fires while people slept - a dangerous practice - and she further exercised her bad temper by "growling", that is, condemning others.When she died, there was much happiness and the people gathered to feast and celebrate. The Ramindjeri ate of her flesh first and, as other groups arrived from the north and the east, they too ate, each devouring different parts of the body and each then speaking a distinct language.⁷²

impact has the potential to obliterate ancient identities. I argue that this is a similar process to the construction of a Ngarrindjeri identity, through the popularising of ideas of the early missionaries Taplin and Meyers. Our ancient names are covered over and without resistance to this process they become buried and forgotten. Michaels writes, 'It is interesting that both books contribute so directly to the discourses of modern "pan-Aboriginality." A recent social construction characterised by denying the local particularity of past (and many contemporary) societies, their languages and law.'

⁷¹ The ancestor who travelled along the River Murray to the Lakes hunting the cod fish.

⁷² Cited in Bell 1998: 137-138 and recorded by Tindale, Norman, 1937:117.

The story of Wururi is interpreted by Bell as being evidence of the whole, the whole being the nation of Ngarrindjeri.⁷³ However, I say the wholeness is what comes out of Kaldowinyeri, from the creative processes which created the natural world and the people that sang of it. The people are a small aspect of the whole being of Wururi. Ngarrindjeri is inflated by Bell to the point it becomes all embracing of Wururi. It is a narrow view of the Wururi story that Bell has taken, one that assists in her construction of an overarching Ngarrindjeri entity. This overarching identity is a concept which is better understood from a western viewpoint and is one which has been influenced by centuries of experience come of dominating and eating up smaller groups to establish larger political identities. The larger group identity then subsumes all others. Perhaps this is the reason these models and processes work; the unification model eats up all else to become one, 'itself'. Identity is a consuming of the other. The process of becoming the Ngarrindjeri nation is one of eating up the identity of the Tanganekald, Yaraldi, Ramindjeri and others.

Bell re-interprets what was initiated by the missionaries Meyer and Taplin, and has been applied since then by other 'experts' of our culture and law. It is now an identity that many 'Ngarrindjeri' have also adopted, as a result of their mission experience of Pt McLeay.

The Ngarrindjeri lived in small family groups within which there were conflicts but there was also an overarching structure. Should we consider the Ngarrindjeri a loose confederacy? A nation? A constellation of closely related languages? One manifestation of the underlying unity was the institution of the *tendi*, a unified system of governance, which operated at clan and interclan levels, with formal "leaders" known as Rupelli. Disputes could

be resolved at the local family or clan level and at the level of the Ngarrindjeri nation. The spider body as the origin of language is another way of thinking about the relationship between different entities. But what is the nature of this unity symbolically represented in the body of the spider?⁷⁴

Bell's question: 'But what is the nature of this unity symbolically represented in the body of the spider?', is a good question. It is her answer and the direction in which it takes us which is problematic. We are lead back to the place we have been for more than 200 years, the container prison of the muldarbi. For those who identify as the 'Ngarrindjeri' people the idea of the Ngarrindjeri nation is attractive in the aftermath of genocide. Through the reduction in population, there is an impetus for the gathering of different peoples into one unified Ngarrindjeri identity.

The nation concept could be politically empowering of Nungas, in terms of international law and politics. But what it means in the language of the coloniser depends on how and to whom it is applied. When we speak of the Australian nation it conjures the image of peoples that are organised into a single state that is recognised by the UN. But when the term nation is applied to Nungas it is confined and restricted in its meaning, it is seen as a federation of tribes. For example the Ngarrindjeri are viewed by the coloniser as a federation of tribes that they call a nation, a nation that is contained and controlled by the state, and is unrecognised by the UN. In that sense a nation identity is without political influence. It is only where we are deemed equal to all other nations that the term is of any practical benefit in empowering our identity.

⁷³ Bell, Diane, 1998:136-144.

⁷⁴ Ibid:137.

What we as Nungas know as nation and what those who have colonised us know as nation are different. Their understanding of our nation status is that it has no reality in terms of international personality because their international relationship with us is one of dominator and dominated. The name nation is attached to us by them in a confined colonising sense, to serve as an indicator of our place as the first peoples, a place that has no international identity. They know us as first nations peoples of the past with no present and a future they are in the process of killing. They apply the term nation to us in anthropological terms rather than in a sense which has any political and international law meaning.

From an indigenous perspective 'nation' carries its own meanings. The word 'nation' needs to be exploded and expanded to properly reflect and accommodate the philosophy of raw law. Expanded to include the voices of the natural world, so that the ruwe of the first nations has a voice. We are not merely on and in the land we are of it, we speak as one voice of the Creation, the voice or song law, land and people is one voice one song.

Before Ngurunderi come to the land there was much prior creative activity. The turtle made the river long before the journey of Ngurunderi.⁷⁵ Unlike Bell who spent a brief time analysing the history of myself and my ancestors⁷⁶ I live of and walk my country as I have always done. In that walk Ngurunderi does not come to me as some dominating god, but rather speaks to me as one of the ancestors, one of my many relatives. Ngurunderi is merely one of the spirit ancestors, he is not all encompassing, providing the word on all things. Just as there is no aspect of the natural world that is

⁷⁵ Bell, Diane, 1998:561, 558.

⁷⁶ Ibid:91.

able to comment upon all matter conclusively, in the collectivity of all things we find what it is to be alive in this creative process. As did Ngurunderi. And so it is also that a Ngarrindjeri nation does not exist to the exclusion of all others, the Ramindjeri, the Tanganekald, the Yaraldi, and the others. These are the first nations peoples to sing up the country. Ngarrindjeri is what the muldarbi called us when they knew nothing of our stories and our laws. Australia is home to hundreds of Nunga nations.

The written journals of the missionary Rev Taplin are used as evidence of Ngarrindjeri culture law and traditions, but the missionaries were unable to comprehend nakedness; they only knew, from their own experiences, to communicate with the male creator whom they constructed as god. In constructing Ngurunderi as the all-powerful creator it provided the missionaries with a road into the 'mind of the naked being'. The missionary Taplin become engaged with learning the languages that he called the Ngarrindjeri language, his purpose was to transcribe the bible into the language of the naked. The 'Ngarrindjeri' were to come to see themselves in the christian myth and their garden of Eden. Only here in their garden we were demonised, and in need of clothing, and to become white just like them.

The impact of christianity is genocidal in its scale and impact on Nungas; the translation of Ngurunderi as god, and the use of our law stories as a channel for christian mythology was the beginning of an ongoing process of dismantling of our culture and laws. During the mission times many of our stories were marginalised, proscribed, many to be lost to living memory. Ngurunderi become the God of the Ngarrindjeri.

Once the process of christianity had established itself Ngurunderi is replaced with the myth of Jesus. The early reverence for Ngurunderi as a God identity was established through the subversive use of our languages by the muldarbi, the place of god in the life of Ngarrindjeri is the inherited legacy of christian missionary Taplin and others. The word God was used to describe the creative powers of the ancestors and their role in creating landscape, natural world, laws and customs. It is a word which brings with it a one - dimensional world order. A word which cancels the feminine and the natural world and its animal life, it lends to dominance a one ordered male view; it led to, for example the demonising of Prupi, and the forgetting of Thukapi the turtle, and Kondoli the whale. The word God made invisible all other creative processes:

It begins with Ngurunderi's cave, which is situated under Signal Point (at Goolwa). From the cave he looked across to the island. Ngurunderi felt it was his responsibility to look after the sky, the bird life, the waters, because he made the environment and the island. He was the god⁷⁷ of the Ngarrindjeri.⁷⁸

We had no gods. Ngurunderi was an ancestor no greater than any other living thing in the natural world. We had no hierarchical order of life that sustained ideas of gods. People and animals like Ngurunderi, Prupi, Tjilbruki, Knowi Thukapi, were the messengers from Kaldowinyeri, they carried the knowledge of law and culture and how to live in the natural world as one. They were teachers, carriers of law, and through their creative actions the stories were sung and the law 'come' to be.⁷⁹ We

⁷⁷ Rev Taplin promoted the idea of Ngurunderi as God, see Taplin 25 June 1859 and 22nd November 1859.

⁷⁸ Cited in Bell, Diane, 1998:578, as told by Veronica Brodie.

⁷⁹ And is not as Bell 1998:138, notes Ngurunderi in a godlike manner came and 'laid down the law'. This idea conjures for me thoughts of an imposing law, as I have said law is a creative process coming to us in song unlike the christian practice and text of law imposed upon us from somewhere above and separate from our songs and ruwe. See also Hemming, Jones, and Clarke, 1989:4, curators working for

held no hierarchy in the way the west created, its God to look down and over his people, we were one equal to all other things in creation, Moana Jackson speaks of the same idea that the Maoris hold;

We did not walk with the whenua to seek some Christian dominion over it. Rather, in the poet's words, we came to the land 'barefoot, as befits a trembling lover', and found our place in the interwoven pattern of life on this planet.⁸⁰

The Ngarrindjeri tendi was recorded by Taplin to be prominent in the sorting out of the political, and legal business of the Ngarrindjeri, and is currently referred to as being a 'paramount law body'.⁸¹ Missionaries, historians, and anthropologists have referred to the tendi when attempting to draw parallels with western forms of law and government. This process of cross translation establishes the tendi as being hierarchical in form, a concept that is alien and a contradiction to our relationship with all things. The tendi was the law but no more than other aspects of culture and tradition, for example the business of the women, children and most importantly the business and the voices of the natural world, and the songs. To view the tendi as hierarchical, in charge of all matter, is a subversion of its underlying nature and character. Doing this is to make the tendi, in the words of Moana Jackson, something that is living in and over the land and not of it.⁸²

the South Australian Museum have assisted in entrenching Ngurrunderi as 'the' creation story the 'text' on all of our things, from; identity, language, culture, and laws. The curators of the Ngurrunderi display noted, "the over-arching importance of Ngurrunderi as law-giver and as the main shaper of the distinctive landscape in which Ngarrindjeri people still live today'.

⁸⁰ Jackson, Moana, 1994:71.

⁸¹ Bell, Diane, 1998:58 reference by Sarah Milera of the tendi as being the paramount body of law and social order.

⁸² Jackson, Moana, 1994:71.

Taplin and others have also said that the rupuli are the lawmen of the tendi.⁸³ I don't dispute that was one of the roles of the rupuli, I would add however that the business of law is more complex than just the tendi as being under the sole influence of the rupuli. This is a model that falls more into the terrain of western political legal systems; it is a model that was put forward by the missionaries, a model which is now also supported by many of the 'Ngarrindjeri'. The business of law is more complex. It involves all of the people as a collective; we all carried obligations to the law. The maintenance of law included roles for women who were responsible for ensuring that the business of the law was done 'properly'. The natural world also speaks and had its voice in the business of law and order. As I have said earlier in this thesis the law emanates from all things. These distinctions are important, because the construction of who we are is constantly subverted, constructed, contained and imposed upon us, ultimately leaving us dispossessed of territory in which we are able to assert the wholeness of self, the wholeness of life in all things.⁸⁴

I have often wondered about the extent of the role Reverend Taplin played in the construction of the tendi. Albert Karloan and Mark Wilson were two important informants for Ronald Berndt as well as for Norman Tindale; they both disputed Taplin's construction of the rupuli as being a head chief, of the tendi. Tindale recorded them as saying the rupuli was a person who could go into a trance and while in that state visit distant places.⁸⁵ The question of the tendi and its construction as a form of law and government versus a spiritual and Nunga identity becomes more

⁸³ Also claimed by Sarah Milera to Bell, Diane, 1998:396.

⁸⁴ You can understand this point more clearly when you recall if you have ever heard them, the despairing voices of Nungas, "there is nothing left that we are able to do" "it doesn't matter what we say, how many times we say it they don't understand" '.

⁸⁵ Tindale, Norman, 1934-7, December 1935:271.

compelling following a reading of Reuben Walker's⁸⁶ Journal where he speaks of the rupuli as having an important spiritual role, and that there were no chiefs, only men stronger than the rest.⁸⁷ Further on in his journal he spoke of how he "called upon (reupillee) for luck in hunting, I would always go through the native custom to ask reupillee to give me luck."⁸⁸ Perhaps the spiritual role of the rupuli threatened the role of the missionary, whose construction of a 'head' of government could be used to the advantage of the colonising and christianising mission, perhaps it assisted them in the subversion of our spiritual, cultural and lawful ways, ways which were incomprehensible to them.

Reuben Walker made the comment that during times of conflict and the need to make peace that the real peacemakers were the older women,

Old woman had more voice than anything in the camp. They were the ones who had voice ...they would talk men down. In the end they did as old women wished.⁸⁹

Walker gives an entirely different view to that recorded by Taplin. The ancestors held a balance in their life ways; the idea of a governing body of men is alien to our ancient law ways. The construction of a patriarchal order is more in keeping with the ways of being that Taplin had known and lived under. As he was the writer of the text it is a reflection of his own understandings and his own knowledge and experience of patriarchal governments which he imposed upon 'his' 'Ngarrindjeri' of

⁸⁶ Reuben Walker was the child of a Ramindjeri mother. He was reared by the Lewarinjarni who were related by marriage to the Ramindjeri; he speaks of the Lewarinjarni as dying out in the 1860s. Walker, R 1934:186. He was schooled for a short time at Pt McLeay mission before leaving to live at Finnis River, a camping place known as *Dang* with the Ruemerungupus of Hindmarsh Island. He lived with his grandparents, Walker, R, 1934:191.

⁸⁷ Ibid:151.

⁸⁸ Ibid:202.

Raukkan, at his mission station he called Pt McLeay, than it is a record of who we were/are. Many of Taplin's ideas took form amongst his Ngarrindjeri, in the attempted conversion of souls to christianity, patriarchy, and whiteness.

Bell incorporates the ideas of Taplin in her recent text, so that they become in the contemporary context legitimised and further entrenched as 'our reality'. Bell's 'reality' as it becomes further popularised empowers itself in the process of rendering our ideas of self invisible, as the experts take control of the playing field in the constructing of our identity. In the following quote taken from Bell she continues to weave from where Taplin left off, a construction of *tendi* that fits within the identity of popular patriarchal structures:

This process might be seen as an adaption of the practices of the *tendi*, where there were notions of representative governance through the person of the *Rupelli* who could speak on behalf of his clan. Ngarrindjeri are certainly arch bureaucrats. They attend meetings, worry over who will chair it, who gets sitting fees, the voting procedures, the agenda, what is a binding decision and so on.⁹⁰

What Bell has failed to paint into this picture in her attempt to popularise the idea of a functional and perhaps traditional *tendi* is the reality of colonialism. Through my eyes I see and know a group of people who identify as 'Ngarrindjeri', claiming to be representative of a 'Ngarrindjeri nation'. There is no over arching political structure of this nature which comes from Kaldowinyeri. It has become a structure which is birthed by the colonising processes and it has taken form and now imposes itself upon

⁸⁹ Walker, R, 1934:151-152.

⁹⁰ Bell, Diane, 1998:405.

us. And it is imposed upon us by those who themselves were once the colonised. The processes of colonialism in the end become self colonising. What is now referred to as the *tendi* does not reflect the past and honour all the *bosses for ruwe*. Instead it supports a group of Ngarrindjeri working within and responding to colonialist agendas, for example responding to native title applications and entering native title agreements. It is a player in the *muldarbi* game of power.

The mission experience provided a framework and a home for the new Ngarrindjeri identity. *Raukkan* was the place where the new mission home emerged in response to the impact of colonialism; and the massive decline in population of the different nations.⁹¹ The emerging one Ngarrindjeri nation was to take form from the belly of genocide.

Before the *muldarbi* the law had settled down the country. The *muldarbi* in its coming imposed its colonial boundaries, and rules which violated our laws. The old ways become layered under the rules of the *muldarbi*. The creation of native title is one recent example of the *muldarbi*'s attempt to erode and subvert our identity. Native title has opened Pandora's box, to a flood of non-native title applications and non-native title claims.⁹² Many of the native title claims compete for the same *ruwe*; the *muldarbi* has created a new way of annihilating our identity, through creating a process that will guarantee conflict amongst Nungas as they now compete with one

⁹¹ Yaraldi nation, Tanganekald nation, Ramindjeri nation to cite a few.

⁹² The *Native Title Act 1993* (Cth) created a native title claims process, based on the common law rules established in the high court decision *Mabo (No 2)*. The rules in this decision do not allow me to be who I am a lover of my grandmother's *ruwe* and custodian for the future generations, nor does it allow me to walk naked in the song law of the *ruwe*. If I am able to prove that I am sufficiently native, that is, still holding the same law that my grandmother held in 1788, and the *ruwe* of the law has not been extinguished by other property interests over the land, then I may hold a form of native title. A title that is determined by the *Native Title Act 1993* (Cth) and now the new state legislation following the *Native Title Act 1998* (Cth).

another for the same 'rights' to ruwe.⁹³ I deal with these issues further in chapter 5 and 6.

Even where there is no competing native title claims, traditional owners have questioned the legitimacy of the native title process. The chairman of the Torres Strait Island Coordinating Council, Getano Lui called the recent process of handing land back to the islanders, on Saibai, as a 'farce' and a 'whitewash'. He said; "we've never lost our land so how can the Government have the audacity to say to us: 'here's you're land back'. I mean, as far as we're concerned we've never lost it so therefore we know native title exists irrespective of any pieces of paper that have been handed back to us by the State Government."⁹⁴

4.6 Am I the enemy?

They called my grandmothers and grandfathers of the Milmendjeri the enemy. Without trial or proclamation of martial law the accused members of the Milmendjeri clan were hanged for the murder of the survivors from the shipwrecked *Maria*, along the Coorong in 1842. From both the crown executive's and judicial officers' points of

⁹³ The recent registration of native title of the Wongatha native title claim, illustrates the conflict between competing native title claimant groups, and is reported by ABC Media Report on March 4th 1999. The Ngaanyatjarra Council, which represents 11 communities in the Goldfields and Central Desert, said the decision of the Native Title Tribunal to register a claim over 220,000 square kilometers in the north-eastern Goldfields was deplorable. The registered claim of the Wongatha is the first in Western Australia to pass the new, tougher registration test, of the *Native Title Amendment Act 1998*. The claimants as a result of their registered claim have the 'right' to negotiate over land use. However the competing claimants represented by the chairman of the Ngaanyatjarra Council Robin Smythe said none of the people involved in the Wongatha claim live on the land in question. He also said the traditional owners who live there and three other groups with native title claims over the area have not been consulted. One of those claimants and chairman of the Warburton Community, Livingstone West, says they will be applying to the Federal Court to have the decision overturned.

⁹⁴ Reported by ABC news link, 'Torres Strait Native Title a Whitewash', Tuesday 6th April 1999.

view there was an expressed confusion as to the naming of the Milmendjeri. Were we British subjects or a people at war with the invading empire? The Advocate-General offered the following justification for the hangings:

Circumstances may occur in which for the safety of the colonist, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however insignificant their numbers, or however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to British interests and authority.⁹⁵

The official explanation of the Advocate-General parallels my own thinking, that is, we are a 'a separate state or nation', although there is a difference in the way we arrive at this point. The Advocate - General constructed the law to justify the genocidal approach officers of the crown had taken towards the ancestors.⁹⁶

Governor Gawler further legitimised the hangings of the members of the Milmendjeri clan to the Executive Council:

The doctrine that they are to be held and dealt with as British subjects, and, under no circumstances, to be tried or punished, except according to the ordinary forms of our law cannot be received without modification. It may be true, in its full extent, as regards those tribes with whom we have constant and

⁹⁵ Minutes of Council, 15th September, 1840; Register, 19th September, 1840; S.A.A. 193, cited in Lendrum 1977:30.

⁹⁶ Governor Gawler, Governor of South Australia requested an opinion from Cooper J of the Supreme Court, 'on the amenability of the Aborigines to European law if they were captured.' The judge replied that he felt it 'impossible to try according to the forms of English law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion, and between whom and the Colonists, there has been no social intercourse.' cited in Castles, Alex 1982:524-525, taken from Lendrum, Aborigines and the Law at First Settlement, unpublished Honours Dissertation, University of Adelaide Law School. It is clear from the Coorong hangings that the colonial officials were unsure of the status and naming that should apply to Nungas. Batman's treaty is another example of early settler thinking, as to the status of Nungas. When Batman attempted to negotiate a treaty with the Koories in Victoria, the crown issued warnings to all other settlers of the penalties they would impose, to discourage further negotiations with the First Nation's Peoples.

peaceable intercourse - for whose subsistence we provide - who acquiesce in, and acknowledge a friendly relation with us - and who are making advance towards civilisation. To our intercourse with these, the ordinary forms of our Constitution and laws may be beneficially and effectually applied. The extension to them of the full rights of British subjects may be practicable, and attended with no evil result. But it would be assuming too much to hold that the same maxims and principles must be applied without modification to distant tribes inhabiting a territory beyond the limits of our settlements with whom we have never communicated under friendly circumstances, whose language is equally unknown to us as ours is to them, and who betray in all their intercourse with Europeans, the most savage and brutal hostility - who have never acknowledged subjection to any power, and who, indeed, seem incapable of being subjected to authority or deterred from atrocious crimes, except by military force. Nor can it be doubted that circumstances may occur, in which, for the safety of the colonists, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to, British interests and authority.⁹⁷

Nungas, who fell outside controlled and 'proper' behaviour, were viewed as being outside the law, the enemy on the outside, the 'myall blackfellow'. We were sovereign peoples, and we practiced our sovereignty differently from European nation - states. Our obligations were not to some hierarchical god, represented by a monarch. Our obligations were to our law, and the responsibility for the maintenance of law in the singing up of country.

Against evidence of a violent invasion and genocide Australia was 'known' as a peaceful settlement, and at settlement the 'Aborigines' become British subjects. From Kaldowinyeri, who we are was/is/will be set in the landscape - the law, and is affirmed in the language, ceremonies, and songs. 'Becoming' British was one of the first of the many lies they layered upon our black and naked bodies.

If we were to forgo the absurdity of the lie that we had become British subjects for a moment and consider the treatment the ancestors received while deemed British, many questions arise. Why were the common law rights of indigenous peoples the right to land ownership, and the fundamental human right to life not protected? What responsibility should the crown carry for crimes of genocide committed against its own subjects, for theft of land, rape and the interference with culture and law? Under what authority did the Advocate-General act when he authorised the hanging of members of the Milmendjeri? And why when the crown later disassociated itself from the action taken by the Advocate General was he not charged for murder? These are just a few of the questions, not yet answered.

4.7 Coloured skin

Nakedness, blackness and our indigenous being become invisible.⁹⁸ Imposed colonial views of Aboriginality have worked towards death, invisibility and our final

⁹⁷ *The South Australian Register*, 19 September 1840, cited in Reynolds, H, 1996:121.

⁹⁸ One can also be as black as black encased in the skin colour white, or white as white encased in the skin colour black. Colour is not just the perceived physical reality it encompasses other dimensions, for example culture, law, obligation, land, relationships to kin. So that black as black in a white skin can be a matter of the colour of one's heart or one's love for the land or their kin, and the source of that feeling is what comes with the spirit and one's connection to Kaldowinyeri our black history.

absorption into their clothed whiteness of being. The muldarbi in its attempts to extinguish Nungas created categories of colour. We were named and managed by the *Aborigines Acts*⁹⁹ as racial categories of 'mixed race' and 'full blood'.¹⁰⁰ This legislation administered our separation from our old people and families, and the language of our songs and law. Nunganness become known to the muldarbi according to degrees of blood, 'quota', such as full blood, half-caste, quarter caste or quadroon, one eighth or octroon.¹⁰¹ They later changed the rules when categories of race become unfashionable and considered racist. But the divisions remain and are renewed. In the construction of who we are in addition to colour they have now included concepts of culture; traditional and non-traditional, or tribal and de-tribalised.¹⁰²

The following resolution was passed in Canberra in 1937 by delegates attending their first national meeting of State and Commonwealth Aboriginal administrators, (what were previously known as Aboriginal Protectors):

⁹⁹ I discuss these Acts further in chapter 5.

¹⁰⁰ These categories are found in the *Aborigines Act Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) sections 3, 4, 9, 31; *Aborigines Act 1905* (WA), sections 2, 3, 12, 60; *Northern Territory Aboriginals Act 1910*, (SA) sections 2, 3, 16, 49; *Aborigines Act 1911* (SA), sections 3, 4, 17, 38. See Pettman, J, 1992:7 for a further discussion.

¹⁰¹ The colonisers in controlling the naming of us, continue to change their definitions to suit their own political agendas. The *Aborigines Act of 1934-39*, broadened the definition to include 'all persons descended from the original inhabitants of Australia, whether of full-blood or less than full-blood'. Under the previous Act, an 'Aborigine' was defined 'as any aboriginal native of Australia, any half-caste who lives with an Aboriginal native as wife or husband, or who habitually consorts with aboriginal natives. Or any half-caste child whose age does not apparently exceed 18 years'. Ward Churchill 1995:31 writes about the use of a eugenics code by the United States government in the General Allotment Act, used to define who was and wasn't Indian.

¹⁰² Nielsen, J, 1998:105, for changing tests on 'Aboriginality', tests which have moved away from being based solely on 'bloodline', to proving bloodline, self-identification, and recognition by the Nunga community. The Department of Employment and Education policies on Abstudy grants separated traditional from non-traditional communities, I refer to this further in chapter 5, 'Genocide now'.

the destiny of the natives of Aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to this end.¹⁰³

When our people didn't die at their mission concentration camps, the muldarbi developed new ways of discolouring us. By the 1930's it was clear that Nungas had survived the attempted genocide, and our survival, became the impetus for their further push for absorption into white Australia. The following Parliamentary debate on the amendments to the *Aborigines Act* illustrates their genocidal intentions:

It is considered by those having knowledge of the subject that many of these people of mixed aboriginal blood should be gradually assimilated into the white population. Clause 14 is, therefore, framed so that every opportunity may be taken to provide that, where an aborigine is of the standard of intelligence as to justify such a course, he should be placed outside the scope of the *Aborigines Act* and encouraged to take his place as an ordinary member of the community.¹⁰⁴

The muldarbi, white racism, imposes its created idea of who is 'real'. A 'real' aborigine is 'full blooded' and 'traditional'. But tradition and who is real, cannot be explained in the vacuum of colonialism, as though who I am is unaffected by more than two centuries of the muldarbi's presence. Who I am still carries the seed from Kaldowinyeri.¹⁰⁵

¹⁰³ Cited in Beresford, Q, and Omaju, P, 1998:30.

¹⁰⁴ Cited in Foster, R, 1997:38, South Australian Parliamentary Debates, 8 August 1939 p467.

4.8 The processes of making invisible

The impact of past protectionist and assimilationist ¹⁰⁶ policies lives today in Nunga communities and is evidenced by high imprisonment rates, deaths in custody, mental illness, domestic violence, substance abuse, chronic health conditions, poverty - just about every social and economic indicator has placed Nungas at the bottom of the muldarbi's hierarchy. Not only does the state fail to take any step towards healing genocide of the past, it continues to apply new genocidal policies. Early frontier violence, massacres,¹⁰⁷ germ warfare,¹⁰⁸ and the policies of protection and assimilation, were policies intended to kill and remove us from the land or to absorb any survivors into whiteness, making us in our blackness no longer visible. Almost invisible, we are now just 2% of the Australian population.

The muldarbi works at making all which is Nunga invisible. Irigaray writing about the attempt to assimilate women said, 'I search for myself, as if I had been assimilated into maleness. I ought to reconstitute myself on the basis of a dissimulation,'¹⁰⁹ Nungas have been doing this for more than 211 years since 1788, retaining the difference by re-finding our Nunga identity reflected to us in the spirit of the land. It is this spirit which has enabled us to survive all the muldarbi's challenges of who we are and their attempts to make us vanish.¹¹⁰

¹⁰⁵ For further discussion see Pettman, Jan, 1992: 24.

¹⁰⁶ Nungas were not included in census counts until 1967. The expectation was Nungas would become assimilated. I deal with these policies further in chapter 5.

¹⁰⁷ There is substantial Nunga oral history that provides accounts of frontier violence and massacres. Massacres occurred at Uluru as late as the 1920's. In my own country in the SE of South Australia, elders spoke of the practice of pastoralists of deliberately poisoning waterholes.

¹⁰⁸ For further discussion see Butlin, N, 1983:11-41, 63-70.

¹⁰⁹ Irigaray, L, 1993:9.

¹¹⁰ The vanishing of us was reasoned and legitimised in the decision *Attorney-General of New South Wales v Brown (1847) 1 Legge's Reports 313*, we were vanished into the law of terra nullius, we were nothing before the law neither slaves or persons. See Kerruish, V, and Purdy, J, 1998:152.

Can we be defined or constructed externally by the other? Can our murderers and rapists define who we are? They have done so and continue to do so, but what meaning do we give it? Can they define our existence away? No more than they can the table, or all that is real before their eyes, without physical annihilation, but then still the spirit remains. The spirit of the ancestors walks the land, the spirits of those murdered, raped, poisoned and starved walk this land as we have always done.

Aboriginal exclusion originally based upon terra nullius, violence, restricted citizenship and institutionalisation, were strategies to build the nation and state as white.¹¹¹

In the physical realm the state was successful in building a white Australian nation, one based on our exclusion, as we were confined by force to government and christian mission stations.

They were also systematically excluded from the emerging nation: physically, through their confinement to reserves and settlements; legally, through their subjection to a separate and inferior legal status; and culturally and psychologically, through an extraordinary forgetfulness, a voluntary amnesia which rendered them invisible within the nation. On occasions they did appear they were contained within representations of the exotic and/ or the primitive.¹¹²

The making of invisible is a universal phenomena experienced by most indigenous and other colonised peoples. A process Columbus began over 500 years ago with the

¹¹¹ Pettman, J, 1992:5.

¹¹² Ibid: 7. Or the well behaved. In the popular fiction, of Johns, WE, 1949, he has Biggles shoot several blacks. The Warner Bros cartoon of bugs bunny released during the 1950s is constantly seen lampooning 'nature boy'. And in the Ralf Harris verse, 'Tie Me Kangaroo Down'; 'let me Abos go

invasion of the Americas. Durham writes: 'the negation of 'Indians' informs every facet of American culture. The energy and vitality for which the New World is famous comes from vampirical activities'.¹¹³

4.9 And who are you?

In the naming of you, non-indigenous¹¹⁴ is the naming of our indigenous. The appropriation of our ways, and our laws, our culture, is the latest in the genocidal behaviour of the muldarbi.¹¹⁵ The appropriation of our cultural identity is cultural genocide. I cover the topic of cultural genocide further in chapter 5. Cultural appropriation is occurring globally in many forms; seemingly innocent examples are in the display of law and cultural designs for commercial purposes and tourism. More sinister forms of appropriation are in the stealing of cultural knowledge of the medicinal properties of plants and the taking of hair and blood samples from indigenous peoples. Mead discusses what Nungas have named the Vampire Project, or what it is more properly and commonly known as the Human Genome Diversity Project, where the project promotes the collection of blood samples from a number of indigenous peoples for study. In one example after the collection of blood and hair samples from the Hagahai people of Papua New Guinea of the Madang Province, the

loose, Bruce'. This verse was withdrawn after a Nyungar threatened to assault Harris on stage during a performance in 1967.

¹¹³ Durham, Jimmie, 1990:10.

¹¹⁴ The non-indigenous in most contexts is the coloniser, and the new wave of people who migrate to our country sustain the colonising process.

¹¹⁵ Michaels, Eric, 1994:40.

project took out a US patent on the components of the genes' qualities of one of the Hagahai people.¹¹⁶

Through this appropriation, our culture, even our genetic identity becomes a commodity. We become consumed and in their consumption they begin to feel that they have also become us; sometimes they feel they are more us than we are ourselves.¹¹⁷ People who want to be like us render our lives unreal. But it's like: what for, haven't you been listening? For those who want to be like us it's no picnic, to live every day as the dominated of a white supremacist society, and experience all that comes of that being that. The experience of living within a process of genocide, ill health, poverty, unemployment, and cultural erosion. While you are busy appropriating our lives, the natural world is disappearing before us. As we keep reminding you, we are, (yourself included if that is your choice), the natural world. I am my ngaitji, I am the ruwe, I am the law. I am part of the whole of life, not the dominator of it.

It is a kind of sickness which makes cultural appropriators want to be us, like they want to eat us, ignoring their own history and their own roles as colonisers. We are now left with the legacy of having to decide whether or not to educate the non-indigenous about this madness, a history where they have controlled the manufacturing of their own 'knowledge' and sanitised history. In their attempt to

¹¹⁶ For further discussion see Mead, Aroah, 1996:46-49.

¹¹⁷ Behrendt, Larissa, 1998:263, writes about the cultural appropriation of a white women who becomes more like us than we are ourselves.

avoid the sickness and to become legitimate they want to be us, to consume us.¹¹⁸

Jimmie Durham argues that;

The settlers must consume us. There is no one to challenge their ownership of us except ourselves, which of course cannot be allowed.¹¹⁹

The settler feels that they must consume us. They feel that they have an historic right to us, and often they are us.¹²⁰

We have a relationship to the natural world and to the wholeness of creation. How did you, the non-indigenous become separate from the whole? When did you, the non-indigenous, lose indigenusness? Was it in your garden of Eden, when you ate of the tree of knowledge, taking the forbidden fruit? Did you become aware of self, the individual and separated, parted from the natural world? Is it that you look to consume us as a way of unknowing your own nakedness? Are you the muldarbi, an imposing muldarbi, eating all in your path to become?

Let's look at some of the ways in which the non-indigenous try to get back into their 'garden of Eden'. Churchill writes about a phenomena in the US of white men playing at being wild men, taking as one of their models 'Indians'; he quotes from Robert Bly, a leader of a US men's group. Similar groups have also formed in Australia:

We must get out of ourselves, ..We must break out of the cage of artificial "self" in which we have been entrapped as "men" by today's society. We

¹¹⁸ Blaut 1993, in his conclusions concurs the West is suffering from a sickness so deep it is beyond their own field of vision.

¹¹⁹ Durham, Jimmie, 1990:11.

¹²⁰ Ibid 15.

must get in touch with our true selves, recapturing the Wild man, the animal, the primitive warrior being which exists in the core of every man. We must rediscover the meaning of maleness, the art of being male, the way of the warrior priest, in doing so, we free ourselves from the alienating tyranny of being what it is we're told we are, or what it is we should be. ...Let the Wild Man loose, I say! Free our warrior spirit!¹²¹

Ward Churchill discusses the problem for "us" in them becoming the wild man:

Native Americans and our ceremonial life constitute living, ongoing entities. We are therefore far more accessible in terms of both time and space than the Druids or the old Norse Odinists. ...Native American societies can and do suffer the socioculturally debilitating effects of spiritual trivialization and appropriation at the hands of the massively larger Euro-immigrant population which has come to dominate literally every other aspect of our existence. As Margo Thunderbird, an activist of the Shinnecock Nation, has put it: "They came for our land, for what grew or could be grown on it, for the resources in it, and for our clean air and pure water. They stole these things from us, and in the taking they also stole our free ways and the best of our leaders, killed in battle or assassinated. And now, after all that, they've come for the very last of our possessions; now they want our pride, our history, our spiritual traditions. They want to rewrite and remake these things, to claim them for themselves."¹²²

¹²¹ Churchill, Ward. 1994:214-215.

¹²² Ibid, 215-216.

I have over the years of my own activism been asked this question most frequently following discussions about what is happening in the Nunga world. They ask me, 'What can I do to help?' Through my own internal decolonising processes I come to answer, 'To help yourself, in your own relationship to your naked and true self. To re-find your own myths and sites of creation wherever that may be in truth, your place your own indigenous origins on this planet earth and to find a way of not being that non-indigenous coloniser that you have become.' I thought for a long time about answering in this way; the internal dialogue ran like this: 'Shouldn't I be giving them a road map on how to get there, so they don't trip out on individuality, and spend a life time navel gazing, while Nungas live and die in the belly of genocide?' 'Shouldn't I be demanding that they help us?' Or, 'isn't it dangerous to leave them at it alone, in coming to understand who they are, shouldn't they have some form of community guidance, what if they continue to procrastinate and do nothing? Does this position leave an opening for white people to continue to do nothing about the trauma of the Nunga world that they live alongside of?' These are questions for white people to answer, for them to consider why we divide the world into indigenous and non-indigenous, and why it is the indigenous world is dying to feed the non-indigenous world.¹²³

Until they stop this feeding frenzy, like Gurukmun the Frog, the non-indigenous will come to us as they have always done treating us as the victim in need of their help. But they cannot help us as they come to us in their trauma satisfied only in the

¹²³ We have the same struggle that is indigenous and non-indigenous, the only difference is that the less comfortable the indigenous normally are catapulted to action more quickly, as it is our lands we see damaged before our eyes and our relatives dying at a rate where funerals are a regular normal ongoing weekly event in the life of Nungas. Meanwhile the indigenous sit in a zone of artificial comfort mostly away from the presence of the natural world and the trauma of genocide, but, in the bigger picture you like us have been constructed by the muldarbi. See Kerruish, V, and Purdy, J, 1998:164.

consuming and the feeding of themselves. So they must fix this one first, so the water can be shared with all the world's indigenous peoples.

The problem is finding a way to communicate ideas to white people, who have since the time of Columbus not been listening to the screams of genocide. And where they are listening they often don't know what to do. I spent some time in Geneva, Switzerland during 1994. I was accommodated in a squat by a small group of students; they were active in the struggle against genocide in South America, and were interested in the Nunga struggle. The question invariably arose, 'What can I do?' I remembered a mountain of great beauty and spirituality that I had visited in their country. It was being mined from the inside, and was covered by hordes of tourists. I remember how sad I had felt, and wondered where the people, the Nungas of this place had gone, no one was talking to this place, it was ruwe that had no more song. So in answer to their question, I said: 'Why don't you find a way to be with your ruwe and talk to it, bless it, love it, become the law.' Because until you know your own indigenous self you cannot help me, to love my ruwe if you have not the capacity to sing and love your own place of ruwe. I don't know any other way to answer their questions. To provide a road map on how to help us from the belly of genocide is one thing, but are they able to do this when they have been sleeping for so long? They have been seeing us as the victim for so long they no longer know the extent of their own loss. It is much deeper than ours, although our losses grow by the hour. Ours are physical losses, losses of life, and removal from our ruwe, but not the loss that Europe and others are still to come to know, as they have yet to acknowledge that they have lost anything. They are losing the spirit and connection to the greater creation.

This response does not let the non-indigenous off the hook and allow them to do nothing about the genocide of the indigenous, because they must act. The physical death of us is to be followed by theirs, they cannot live in a world where the song is no longer sung. The old people who are still singing are singing for you also, without the song there is only death, death of body and spirit.

The following quote is taken from a speaking tour of Germany by M Annette Jaimes, Bob Robideau, Paulette D'Auteuil and Ward Churchill. In answering that same question 'what is it we can do to help you', the delegation responded:

“..we really mean it when we say we are all related. Consequently, we see the mechanisms of our oppression as being equally interrelated. Given this perspective, we cannot help but see a victory for you as being simultaneously a victory for us, and vice versa: that a weakening of your enemy here in Germany necessarily weakens ours there, in North America: that your liberation is inseparably linked to our own, and that you should see ours as advancing yours. Perhaps, then, the question should be reversed: what is it that we can best do to help you succeed?”¹²⁴

In response to the above statement some of the audience took exception to the sameness of the struggle, wanting to emphasise the difference between being colonised and being of the colonising group. Churchill responded by arguing all places and spaces are now colonised and that 'for Europe to become 'Europe' at all – it first had to colonize *itself*'.¹²⁵ Churchill then went on to argue that all of the

¹²⁴ Ibid: 232-233.

¹²⁵ Ibid:234.

struggles of humanity are linked, and that it is simply a process of coming to see this picture. In speaking to the group Churchill offers the following advice:

..you've become self-colonizing, conditioned to be so self-identified with your own oppression that you've lost your ability to see it for what it is, much less to resist it in any coherent way.It takes the form of an insight offered by our elders: 'To understand where you are, you must know where you've been, and you must know where you are to understand where you are going.' For us, you see, the past, present, and future are all equally important parts of the same indivisible whole. And we believe this is as true for you as it is for us. In other words, you must set yourselves to reclaiming your own indigenous past. You must come to know it in its own terms-the terms of its internal values and understandings, and the way these were applied to living in this world-not the terms imposed upon it by the order which set out to destroy it.¹²⁶

4.10 The universal order

Our lands are consumed by the Australian state we are not geographically separate, and for those indigenous peoples who are not, we remain living within colonised enclaves throughout the world. The idea that colonialism no longer exists, whilst 300 million indigenous peoples globally still live a colonised existence, is part of the muldarbi's schizophrenic illness. The myth that colonialism ended and self-determination was free flowing for indigenous peoples with the UN General Assembly resolution 1514 (XV) of December 1960, the Declaration on the Granting

¹²⁶ Ibid:234-235.

of Independence to Colonial Countries and Peoples, is a lie. The granting of independence applied only to colonies which were geographically separate from the colonial state; the 'territorial integrity' of the states is protected by paragraphs 6 and 7 of UN resolution 1514. The myth that colonialism has ended has become an effective genocidal tool of the state, it has left open the door for the rhetoric of 'post-colonialism' to spread throughout the states' academic institutions. The myth is supposed to conclude with the absorption of indigenous peoples through the genocidal policies of the colonial state. Only this is not named genocide and colonialism by the courts of the colonial state, but is named by vague and user friendly terms as in *Mabo (No2)* by Brennan J as being 'washed away by a tide of history'.¹²⁷

Who are we amidst the academic post-colonial rhetoric? Is the Australian state guilty of the UN Resolution 1514 crime of colonialism 'the subjection of peoples to alien subjugation and domination and exploitation constitutes a denial of fundamental human rights.'? Resolution 1514 is of no assistance to indigenous peoples' struggle to end colonialism because of the following paragraphs 6 and 7:

6 Any attempt at the partial or total disruption of the national unity and the territorial integrity of the country is incompatible with the purposes and principles of the Charter of the United Nations.

7 All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples.¹²⁸

¹²⁷ Brennan J in *Mabo (No2)* (1992) 175 CLR 1:69.

¹²⁸ UN General Assembly resolution 1514 (xv) of 14 December 1960.

The Declaration on the Granting of Independence to Colonial Countries and Peoples expresses the conflict over who holds sovereignty peoples or states. This resolution also contradicts its purpose, that is to rid the world of the crime of colonialism. Paragraph 6 of the resolution guarantees that colonialism will not end, because it protects the identity of nation states, like Australia, the United States, Canada, and New Zealand. States that were created through the crime of colonialism. This paragraph protects the 'territorial integrity' of States, while it denies indigenous peoples as having a rightful claim to our territories stolen from us by the colonial state.

In the shaping of our identity as First Nations Peoples Nungas face the Australian state, one that shares a membership at the United Nations with others, some of whom like Australia, have created their identities upon the spoils of colonialism. These states act together as though their act of togetherness somehow legitimises the conspiracy and reluctance to end colonialism and genocide. We ask the Australian state: by what lawful process have you come into being? Who are you really? Its responding arguments known to the state as 'international law' are referred to reverently, as though this 'international law' will conjure a magic answer that absolves lawlessness and blame for centuries of evil which has been wreaked upon indigenous peoples. However, the acquisition of sovereignty at international law at the time Australia was invaded allowed sovereignty to be acquired through conquest, cession or settlement on the basis of terra nullius. The question is now that the doctrine of terra nullius has been removed as the basis for settlement what makes in their rules legal the invasion? They are left with conquest and cession, and both require treaties or other agreements. In the absence of any agreements there is a

gaping silence one they initially filled with the violence that comes with the power of military force. That is the origins of the Australian state.¹²⁹ And as we examine the skeletal frame of the Australian state we are joined by the world's global indigenous peoples whose lives and lands like ours are threatened daily by the spread of development interests. Indigenous peoples negotiate in the language of self-determination for a way to survive the muldarbi.

From the earliest developments of international law indigenous peoples have attempted to participate. One of the earliest delegations of indigenous peoples to bring their stories to the international community during the 1920's, were the Maori religious leader Ratana and Chief Deskaheh (Speaker) of the Six Nations Confederacy. They petitioned the League of Nations to have their voices heard, their efforts were opposed. Chief Deskaheh spoke in 1925 to the League of Nations; his words were to fall upon the deaf ears of colonialism;¹³⁰

If this must go on to the bitter end we would rather that you come with your guns and poison gases and get rid of us that way. Do it openly and above-board. Do away with the pretence that you have the right to subjugate us to your will.¹³¹

The League of Nations opposed applications from indigenous peoples for membership, arguing that it was due to the small size of indigenous nations. However

¹²⁹ See Watson, I, 1993:5-8, for an early discussion on the decision in *Mabo (No2)* and its aftermath.

¹³⁰ Sanders, D. 1992:485-424, for the history of the indigenous attempts to be heard internationally.

¹³¹ Cited in Barsh, and Henderson, 1982:42-43. Schulte-Tenckoff I, 1998:246-247, argues the 'assumption that 'backward' peoples could not lay claim to sovereignty is also a relatively recent one. Only in the second half of the nineteenth century did a positivist and eurocentric view denying non-European peoples an international legal personality arise, which made international recognition of such peoples dependent upon their 'civilization' under the guidance of European powers'.

the Law of Nations had itself grown out of relations between two thousand tiny city states of the Roman empire, and the UN itself has admitted San Marino to becoming a full member of the UN, a tiny enclave state that lived within Italy. Throughout the evolving history of international law indigenous peoples have been 'there', as we are still today, but our voices are not heard. We have been rendered invisible by the collective force of firstly the League of Nations and then the United Nations. Indigenous peoples made the same representation to the founding conference of the United Nations in San Francisco in 1945 as they had done at the formation of the earlier League of Nations. The Six Nations Confederacy once again unsuccessfully sought recognition. The rejection of indigenous peoples was based on the idea of us being 'backward peoples'.¹³²

Following the UN rejection of the world's First Nations Peoples the government of Bolivia¹³³ in 1949 was also unsuccessful in its attempts to establish a study on the situation of Aboriginal Peoples of the American continent. During this period the UN was formulating the *Genocide Convention* of 1948, and the *Universal Declaration of Human Rights* of 1949. They were followed by other human rights instruments, the *Declaration on the Granting of Independence to Colonial Countries and Territories* of 1960, the *International Convention on the Elimination of all Forms of Racial Discrimination* of 1965, and the two International Covenants on Human Rights in 1966, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*. These Conventions have not

¹³² Schulte-Tenckoff, Isobelle, 1998:246-247. George Pavlich, 1998:185, argues, 'So long as the discourse declares indigenous law and control absent, arbitrary, or evil, it becomes possible to bid for the exclusive legitimacy of a colonial legal 'order'.'

¹³³ Perhaps because of its own high population of indigenous peoples.

provided indigenous peoples with a remedy against genocide or land dispossession; for Nungas breaches of human rights are the norm.¹³⁴

In 1971 a study on racial discrimination grew from the UN decade to combat racial discrimination.¹³⁵ This initiative was followed by the Economic and Social Council (ECOSOC) authorising a study by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, (the Sub-Commission). The Sub-Commission appointed in 1971 Jose R Martinez Cobo, who completed the report *The Study of the Problem against Indigenous Populations*.¹³⁶ These studies were then followed up by a number of UN conferences to discuss the impact of racism upon indigenous peoples. In 1977 the UN Non-Governmental Organisations (NGO) Conference on Discrimination against indigenous peoples of the Americas was held in Geneva. The conference called for "the right of indigenous peoples and nations to have authority over their own affairs".¹³⁷ In 1978, the World Conference to Combat Racism and Racial Discrimination endorsed the right of indigenous peoples to maintain their traditional social and cultural identities and called for the recognition of indigenous land rights.¹³⁸ Then the 1981 NGO Conference on Indigenous Peoples and the Land called for the establishment of a permanent working group on indigenous populations. In the following year 1982 the UN *Working Group on Indigenous Populations* (WGIP) was formed, and since that time it has remained one of the main international forums used by indigenous peoples.¹³⁹ The WGIP meets

¹³⁴ For further discussion see, Turpel, 1992:579 on the ILO Convention.

¹³⁵ This study was supported in 1971, by the UN General Assembly resolution 1580 (1).

¹³⁶ UN Doc E/CN.4/Sub.2/1986/7.

¹³⁷ Barsh, R, 1986:369-371.

¹³⁸ Declaration of the World Conference to Combat Racism and Racial Discrimination, cited in Falkowski, 1992:60.

¹³⁹ The WGIP first sat in the UN at Geneva during August 1982. It meets annually just prior to the sitting of the Sub-Commission. The WGIP was established by ECOSOC Resolution 1982/34, 7 May 1982.

annually with indigenous peoples' representatives and representatives of UN member states, but in terms of status the WGIP is at the bottom of the UN hierarchy.¹⁴⁰ The WGIP consists of five independent members from the *Sub-Commission on Prevention of Discrimination and Protection of Minorities*.¹⁴¹ The mandate of the Working Group is as follows:

- (a) review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples, and
- (b) give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and the differences in the situation and aspirations of indigenous peoples throughout the world.¹⁴²

The WGIP rules of procedure which were established under the chairmanship of Asbjorn Eide allow oral and written interventions from all indigenous organisations. This rule is in contrast to the usual UN requirement limiting participation to inter governmental agencies, and accredited non-governmental organisations but the WGIP also allows interventions of states. While the rules of the WGIP have allowed for the participation of indigenous peoples in the drafting of the *Declaration on the Rights of Indigenous Peoples*, we have had no voting power and no right to observe the final deliberations of the members of the working group. For example indigenous people had no say or vote in the decision made by the members of the WGIP in 1993 that it

¹⁴⁰ The UN hierarchy is as follows: the *Working Group* is at the bottom of the *Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, the *Commission on Human Rights*, the *Economic and Social Council*, and then finally the *General Assembly*.

¹⁴¹ Those members were at the 1996 session; Chairperson, Ms Erica-Irene Daes (Greece), Mr Miguel Alfonso Martinez (Cuba), Mr Volodymyr Boutkevitch (Ukraine), Mr Ribot Hatano (Japan), Mr El-Hadji Guisse (Senegal).

¹⁴² Economic and Social Council Resolutions 1982/34 of 7 May 1982. In 1985 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted a resolution that endorsed the Working Group's standard-setting activities to produce a Draft Declaration on Indigenous Rights.

was time for the Draft Declaration to move from the WGIP and onto the Sub-Commission. Following the WGIP meeting in 1994 the evolution of standards passed on to the Commission on Human Rights, Working Group, on Indigenous Peoples. This is a committee which was set up specifically to take over the role of drafting the *Declaration on the Rights of Indigenous Peoples*. At this level the states have become more vocal in regard to the content of the Declaration, the voice of the states is likely to increase as the Declaration makes its way to the final vote at the General Assembly.

In considering the future of the WGIP, its chairperson Erica Daes in her speech to the UN Human Rights Conference held in Vienna in June 1993, called on the conference to support the further development of the WGIP.¹⁴³ Daes proposed that the WGIP mandate be expanded to include an evaluation of UN activities affecting indigenous peoples, and for the committee to become an expert committee which included indigenous peoples nominated by 'their' governments. If the chairperson was referring to indigenous participants nominated by indigenous governments we could have anticipated a degree of independence, but this is an unlikely interpretation. The nomination by states of indigenous representation to a committee is likely to be a selection of indigenous individuals who reflect the view of the respective states and not the indigenous collective view.

Since its inception the WGIP has heard from indigenous peoples about human rights abuses under agenda item "review of developments"; however, the WGIP does not have a mandate to investigate complaints.¹⁴⁴ Other UN bodies with a mandate to

¹⁴³Speech to the World Conference on Human rights, Vienna 18 June 1993. The proposal was supported by the General Assembly, see Resolution 48/163 of 21 December 1993.

¹⁴⁴The review process enables the exchange of information between indigenous representatives and states, that are edited into the annual WGIP report.

investigate are not used with any frequency by indigenous peoples and in particular there has been very little contact between groups in Australia with these UN bodies. Some of the complaint procedures available are by way of the Commission on Human Rights,¹⁴⁵ confidential procedure established under ECOSOC resolution 1503.¹⁴⁶ The Human Rights Committee, under the Optional Protocol to the International Covenant on Civil and Political Rights,¹⁴⁷ and to the Committee on the Elimination of Racial Discrimination¹⁴⁸ (CERD) can hear complaints provided the State has signed the Covenant.¹⁴⁹ I discuss the CERD complaint procedures further in chapter 5, at 5.10.

4.11 Exclusion on a global stage: they say we have no international personality

Initially preclusion was based on racist colonial myths of backwardness, power and greed; today preclusion from the UN is still based on power and greed but it is also a fear that the recognition of indigenous peoples' right to self-determination will erode the territorial integrity of current UN states.

¹⁴⁵ Under Article 68 of the UN Charter, the Economic and Social Council, established a Commission On Human Rights, (CHR) comprising 53 members, all representing states. The complaints procedure of the CHR has no power to deal with complaints, instead it administers a bureaucratic procedure, which compiles a list of complaints.

¹⁴⁶ The 1503 procedure is mostly ineffective, it purports to address human rights issues, but has never addressed issues of economic, social and cultural rights issues. Alston argues that perhaps one favourable outcome of the 1503 procedure is that it 'paved the way for the inclusion of a petition procedure in CERD, which was adopted in 1965. Until that time, there was no agreement to include an Optional Protocol to the International Covenant on Civil and political Rights (ICCPR). It...strengthened the hands of those who wanted a more generalised complaints procedure in connection with the ICCPR, Alston, P, 1998:83.

¹⁴⁷ Under the Optional Protocol with the accession by Australia in 1991, the Committee is able to receive and examine complaints where it is alleged that Australia has failed to comply with the human rights standards recognised in the ICCPR.

¹⁴⁸ The Committee is established under the International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 21066 A (XX) of 21 December 1965.

States wrestle with new languages and theories to contain the international identity of indigenous peoples, Isobelle Schulte-Tenckoff calls this process the 'paradigm of domestication'. International relations and governance are layered with the exclusion of indigenous peoples. Richard Falk argues that the statist character of international law controls the international agenda in all ways, and that such control is internalised into the procedural framework of the international political system.¹⁵⁰ The exclusion of indigenous peoples from having an international personality is maintained through the use of mythological geographical barriers that limit the principles of self-determination. Indigenous peoples of Australia, the USA, and Canada for example, are disabled from achieving greater freedom from colonialism because our lands lie within the colonial state; we live within states who refuse to accept the reality that they are still colonists. When indigenous peoples affirm and assert indigenous sovereignty, and resist genocide and ethnocide and the continued plunder of our territories, we are viewed as childlike, irrational and not fully comprehending of international law, politics and international relations. This view is an echo from the past and illustrates a 'closeted' racism and continuing global colonialism.

4.12 Self-determination

The language of self-determination¹⁵¹ has been adopted and used by indigenous peoples to express who we are to the world and the path or process along which we

¹⁴⁹ For further discussion on the difficulties indigenous peoples have in accessing UN procedures, see Turpel 1992:579.

¹⁵⁰ Falk, Richard, 1995:17-21.

¹⁵¹ It is referred to in Articles 1, para. 2 of the United Nations Charter, and also in the 1960 General Assembly resolution 1514 XV, proclaiming a right of self-determination of all peoples. In 1966, self-

should proceed in respecting and recognising our law and life ways as peoples and custodians of the earth our mother. In finding that path or process we look back to our ancestors and consider whether the path we have chosen is the one which will do justice to our ancestors and to their ideas of who we are. We also look to the children now present and still coming and consider whether that choice will bring justice to them, that they will know who they are, and also know the ancestor, the custodian of the earth our mother in themselves.

From the time before Cook we were living in the law, it was the basis of our political and social structure. We were free to determine our economic, social, religious and cultural development.¹⁵² I use the term self determination to reflect upon a standard that is known in international law which comes closest to empowering the lifestyle that our ancestors enjoyed living. However the life they lived was different from how life is lived now and what they practiced was more than the contemporary principle of self determination a term that is defined by the politics of international and law and the relations between the states and the international UN system allows. The ancestors were free from the power and interference of international relations and lived in the law of song. It was the song law that laid out the international relations between peoples.

Self-determination is an experience that we once lived, in freedom from the muldarbi.

It is now sought again so that we may become free to live without the fear of the

determination was inserted into Article 1 of the International Covenants on Human Rights. Four years later self-determination appeared in the Friendly Relations Declaration. The 1984 *World Council of Indigenous Peoples Declaration* stated, 'All Indigenous Nations have the right to self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic social religious and cultural development.'

¹⁵² Self determination is a term used in Article 1 of the International Covenant on Civil and Political Rights, it is stated as a right of all peoples.

muldarbi and genocide. Nungas coexisted in the law, we were not waiting to be 'discovered' or waiting to be 'granted the right to be' self-determining, for that was what we already were. The colonial state can not give us who we are, for it was never theirs to give. Who we are emanates from the law. We cannot seek back the ability to be from the one who has not yet become. Become a (legitimate) being of the law. And yet we dialogue with the muldarbi in the language of self determination, in the struggle to reassert a territory which is free of its genocide, so that we may teach the law to a world which is deprived and malnourished for the lack of it.

Self-determination is vested with the people. It is a collective right of the group against the state and other governments.¹⁵³ Falk argues that if self determination was vested in states, it would then be held by an 'artificial and derivative political reality as compared to people.'¹⁵⁴ Eurocentrism, global politics, the decolonisation movement, and the increasing paranoia of states to protect 'their' territorial integrity affect the meaning of self-determination and the contexts in which it is 'allowed' to take form. Crawford argues that the way in which the principle of self-determination has been applied over the past 30 years throughout the decolonisation process has been in a context of decolonising territories rather than peoples.¹⁵⁵ Indigenous peoples' claim to self-determination is viewed by the colonialist as a challenge to the 'territorial integrity' of existing states. Claims that may result in a potential threat to world peace.¹⁵⁶ As though peace was a known and lived reality that is not already in fragments. For many of us are living in a constant state of siege, where peace is

¹⁵³ Crawford, James, 1988:164, is one characteristic noted in his analysis of the right to self-determination.

¹⁵⁴ Falk, Richard, 1988: 25.

¹⁵⁵ Crawford, James, 1987:17.

¹⁵⁶ For further discussion R. Falk, 1988:18. Falk argues that self-determination for peoples must be reconciled in practice with the existing geographical delimitation of territorial boundaries of sovereign states.

neither known of nor experienced. Since Columbus indigenous peoples have known nothing but conflict and the plundering of 'our' territorial integrity.

There are two prevailing views about the character of the right to 'self-determination'; one is that it is a legal right that gives rise to concomitant legal claims and obligations, and two, it is a political principle.¹⁵⁷ In the reality context the principles of self-determination are formed and contained by the continuing global colonialism and its contemporary muldarbi faces.¹⁵⁸

What does self-determination mean, for Nunga peoples of Australia? The singing up of country. Independence from the State. Self-government rule within the state, constitutional recognition, the protection of culture and the protection against breaches of human rights. Other than the option to sing up the country and independence, all others fall within the continuing control of the colonial state and are a form of internal self determination.¹⁵⁹ The Chairperson of the UN Working Group on Indigenous Peoples (WGIP), Erica Daes, stated at the 1992 WGIP session that self-determination in its reference to the rights of indigenous peoples 'was used in its

¹⁵⁷ Davies, Maureen, 1985:748. The Yugoslavia Arbitration Commission found the term self-determination was an evolving principle that remained unclear as to all of the rights and obligations that flowed from the term: Opinion No 2, 11 January 1992, 31 ILM (1992) 1497, 1498.

¹⁵⁸ One contemporary face can be found in the growing power over states that is held by trans national corporations. This field of power can be seen in the growing intensity of resource development interests in Australia.

¹⁵⁹ The Aboriginal Torres Strait Islander Commission is promoted as being a model in self determination. ATSIC is a statutory body created by the *Aboriginal and Torres Strait Islander Commission Act 1989*, (Cth), (ATSIC). The chairperson of ATSIC is nominated by the federal minister of Aboriginal Affairs, while other members are elected. ATSIC received Non Governmental Organisation (NGO) status in 1994 an application that was opposed by Nunga peoples. It was argued that ATSIC was a governmental body and not capable of NGO status. Nevertheless the UN awarded NGO status to ATSIC. ATSIC in the past and now again more recently, during January 1999 is promoted by its Chairperson as the body that is competent to enter into negotiations for a treaty with the Australian government on behalf of the 'Aboriginal nation'. I discuss in more detail the issues a treaty proposal raises in chapter 7. But in brief ATSIC is not independent of government so that any negotiations ATSIC may enter into will result in an agreement between government and a statutory body of the Australian government. ATSIC is not representative of all Nungas, it cannot represent the

internal character, that is short of any implications which might encourage the formation of independent states'.¹⁶⁰ However in the decision of the International Court of Justice, in the *Western Sahara*¹⁶¹ advisory opinion, decided self-determination was a right which could be invoked by its holders to claim separate statehood and sovereign independence.

Short of a miracle or a dramatic worsening of the global environmental position which shocks the world, it is unlikely that the UN will define and endorse 'indigenous peoples' as being people who have an unqualified right to self-determination, equal to others who freely exercise self-determination. Because as they argue it would pose a threat to their 'territorial integrity'. Professor Rosalyn Higgins¹⁶² expressed the view during a talk on self-determination to a meeting of interns at the United Nations in Geneva in July 1992, that state boundaries had to be maintained for reasons of world peace.¹⁶³

In their effort to maintain state boundaries regardless of the injustices to the humanity of indigenous peoples the most that can be expected in terms of positive outcomes from the UN is that some states will support a limited right to self-determination, one that may be exercised within the jurisdiction of the colonial state, a form of self-determination that is subservient to the rules of the colonial state. If this is the last word from the UN then all they have done is to legitimise the continuing colonial relationship between the dominant state and indigenous peoples. And their

Aboriginal nation as there is not one Nunga nation, but hundreds. For further discussion on ATSIC see Watson, Irene, 1996:7.

¹⁶⁰ UN doc. E/CN.4/Sub.2/93. Para.80.

¹⁶¹ International Court of Justice Reports 1975:12, 31-33.

¹⁶² As she then was prior to her appointment as a judge to the International Court of Justice.

¹⁶³ I was present at this meeting, and the comments were also cited in Sanders, D, 1993:80:81.

proclaimed claim of decolonisation and the rhetoric of post-colonialism is unsubstantiated: a rhetorical facade.

4.13 Draft Declaration on the Rights of Indigenous Peoples

The WGIP was established in 1982. One of its mandates was to give special attention to the evolution of standards concerning the rights of indigenous populations. Indigenous peoples have been participating in the UN process of drafting the *Draft Declaration on the Rights of Indigenous Peoples*, and have attempted to negotiate minimum standards or 'rights' for the protection of indigenous peoples against further incursions into our territories and against the genocidal practices of states and trans-national corporations.¹⁶⁴ In this process we have had little space to reflect upon what it means to establish 'rights' for indigenous peoples, for many are still consumed with the struggle against genocide. When it comes to rights talk, you either have it or you don't. Trask comments on how meaningless a rights discourse is when the discussions are contained by the coloniser. Here she is referring to Hawaiian rights within the American context; and it is equally meaningless to speak of Nunga rights within the Australian context:

Ideologically, "rights" talk is part of the larger, greatly obscured historical reality of American colonialism.by entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonization. Once indigenous peoples begin to use terms like language

¹⁶⁴As to the status of a Declaration, it is not binding on a state, it is binding on states only if it is a statement of principles which have already become norms of "customary" international law or are norms of "conventional" international law which are binding on the state in question because the state has signed a particular treaty.

'rights' and burial 'rights', they are moving away from their cultural universe, from the understanding that language and burial places come out of our ancestral association with our lands of origin. These indigenous, Native practices are not 'rights' which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel. ...When Hawaiians begin to think otherwise, that is, to think in terms of 'rights,' the identification as 'Americans' is not far off.¹⁶⁵

While the idea of rights is constructed and contained by the coloniser we don't have the ideal, or the freedom to be who we are. We are constrained by the dominant power of the colonist, in the way or the extent to which we live an indigenous life. In Australia indigenous ways are tolerated where they are of commercial value; here they are commodified for a growing tourist industry in search of the primitive and the exotic. We have a 'right' to maintain a lifestyle which is of commercial value, but our spiritual lifeways are demeaned and patronised, and we are coerced into mainstream spiritual beliefs. It is important to give the indigenous perspective when we are talking in the language of 'rights' otherwise the dialogue is meaningless.¹⁶⁶

The process of defining who we are is one the international community of colonialists has dominated since the time of Columbus, and is now taken up more recently by the UN. The work of the WGIP in drafting the *Declaration on the Rights of Indigenous Peoples* experienced difficulties in gaining consensus on the definition of indigenous people. However Miguel Martinez argued that the lack of a formal definition of indigenous people should not be a deterrence to the adoption of the *Draft Declaration*

¹⁶⁵ Trask, H, 1993:112-113.

on the Rights of Indigenous Peoples, especially where formal definitions of peoples was not formalised when the UN adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960* and the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992*.¹⁶⁷

In the study by Cobo on discrimination and the world's indigenous peoples; as a part of that study he commented on a working universal definition of 'indigenous people':

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁶⁸

Cobo discusses the process he adopted in coming to a definition of indigenous peoples as follows:

¹⁶⁶ See the Canadian decision in *Sparrow 1990*, 1 SCR 1075:1112, where it was said 'It is crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake'.

¹⁶⁷ See, Second Progress Report by Miguel Alfonso Martinez, Special UN Rapporteur, for the Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations, 47th session, Item 14, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1995/27, 31st July 1995, p 10.

¹⁶⁸ Cobo, Study of the Problem against Indigenous populations, Vol 5, Conclusions, Proposals and Recommendations, UN Doc E/CN 4/Sub 2/1986/7 Add 4, para 379.

- (a) Indigenous peoples must be recognised according to their own perceptions and conception of themselves in relation to other groups co-existing with them in the fabric of the same society;
- (b) There must be no attempt to define them according to the perception of others through the values of foreign societies or of the dominant sections in such societies;
- (c) The right of indigenous peoples to define what and who is indigenous, and the correlative, the right to determine what and who is not, must be recognized;
- (d) The power of indigenous peoples to determine who are their members must not be interfered with by the State concerned, through legislation, regulations or any other means; artificial, arbitrary or manipulatory definitions must be rejected. The special position of indigenous peoples within the society of nation-states existing today derives from their historical rights to their lands and from their right to be different and to be considered as different.

Cobo was reluctant to conclude with a definition of *indigenous populations*, he saw that it was a right of the indigenous groups themselves to define who was indigenous, he did offer the following as a starting point:¹⁶⁹

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group).¹⁷⁰

¹⁶⁹ Alternative views are that while the lack of an agreed definition has the advantage of promoting local control and self-definition, the disadvantage is the power that it leaves for individual states to determine indigeneity in their terms, see Otto Diane 1995:82.

The most important clause in the *Draft Declaration on the Rights of Indigenous Peoples*, refers to the right to self-determination. Part 1, Article 3, provides:¹⁷¹

Indigenous peoples have the right of self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development.¹⁷²

The Declaration without this article would be meaningless, Nungas would remain captives of the colonial state, and contained by the internal rights discourse which Trask speaks of or the 'domestic paradigm' which Schulte-Tenkoff argues, is the current regime indigenous peoples live under. To limit the right to self-determination would render Article 3 meaningless. The move to characterise or limit self-determination by providing a shopping list of alternatives as in the following Article 31, stands to weaken Article 3:

Indigenous peoples, as a specific form of exercising their rights to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

¹⁷⁰ Cobo, Study of the problem against Indigenous populations, Vol 5, Conclusions proposals and recommendations, at pp 50, 51.

¹⁷¹ UN Doc E/CN.4/Sub.2/1994/2Add.1.

¹⁷² Article 3 is re-inforced by preambular paragraph 14, "Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-

The WGIP came under pressure from the UN General Assembly to complete the *Draft Declaration on the Rights of Indigenous Peoples*. At the time the UN proclaimed the *International Year of the World's Indigenous Peoples*, the General Assembly called for the completion in 1993 of the Declaration by the WGIP. This same request was repeated at the UN World Conference on Human Rights, in Vienna in 1993.¹⁷³ The role of the WGIP in the drafting of the Declaration was ended in 1993; the decision however to end the role of the WGIP in the drafting process was made without a mandate from or the full support of indigenous participants to the WGIP. At the 1994 WGIP session presentations were made by indigenous representatives both for and against the movement of the Draft Declaration from the WGIP onto the Sub-Commission. It was argued that the move was premature, because the current rules on participation of the Commission on Human Rights, (the next body in the UN hierarchy to review the Declaration in its climb, (or decline) to the General Assembly) would disadvantage Indigenous Peoples. The rules of the Commission on Human Rights allow for the participation of State representatives and NGOs (with a limited right to participate) recognised by their respective states. This rule excludes indigenous peoples from the process unless they are mandated through an NGO or supported by their respective state. It is obvious that indigenous advocates who disagree with the state's position would not be endorsed by their respective colonial state. This situation guarantees a monopoly by the states, unless more equitable rules on participation are developed.¹⁷⁴ The likely outcome is a

determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.”

¹⁷³ It is interesting to note that the preparation for other Declarations had taken much longer than the 12 years to complete taken by the WGIP.

¹⁷⁴ In a letter to the author March 1995, from Sharon Venne and Millilani Trask, where they recommend that the rules of procedure of the CHR be amended to allow for the full participation of indigenous peoples.

Declaration reflecting states' perspectives on indigenous peoples rather than indigenous ones.¹⁷⁵

In closed meetings during August 1993 the Working Group completed the draft. At the WGIP 1994 session indigenous participants were not invited to amend the draft but were rather "allowed" to make brief comments. Some indigenous representatives expressed concern that article 31 was a limitation on the right to self-determination.

In my view if a people have the right to self-determination than they have it. It is unnecessary to provide a shopping list of what it could be or could include. That is, not unless the intention is that the right to self-determination of indigenous peoples is to be construed as a limited or qualified right and one that is exercised within the domestic paradigm.¹⁷⁶ To suggest that the Draft Declaration contains no qualification on the right to self-determination is to ignore its future myth - making potential. Article 31 provides a shopping list of other options of which they could all be characterised as a form of internal self-determination, one that maintains the domestic dialogue, and one that prevents our development as subjects of international law.¹⁷⁷

The states participating in the WGIP drafting of the Declaration have always noted their objection to the inclusion of a right to self-determination in the document. The Commission on Human Rights (CHR) at their February - March meeting in 1995, passed a resolution to establish its own Commission on Human Rights Intercessional Working Group on the *Draft Declaration on the Rights of Indigenous Peoples* to

¹⁷⁵ A letter to the author from the Dept Foreign Affairs on the 2.6.95 the Australian Department of Foreign Affairs representative expressed the view that to open this discussion any further would lead to a worsening of the situation. But from an indigenous perspective can it get any worse?

¹⁷⁶ See Gudmundur, Alfredsson, 1993:41-54. for a further discussion on limited rights to self-determination and the distinction between internal and external self-determination.

¹⁷⁷ See Ions, Catherine, 1994 301, and Otto, Di 1995:92, their views assist in this myth making process.

continue drafting the Declaration.¹⁷⁸ Indigenous peoples expressed concern for the loss of indigenous voice and participation at the second session of Commission on Human Rights Intercessional Working Group meeting during 21-1 November 1996. At the meeting the majority of indigenous peoples walked away from the process in protest. However unfortunately for the representation of Nungas, the Australian delegation represented by Mick Dodson in his position as Aboriginal Social Justice Commissioner and speaking on behalf of the Central Land Council, Indigenous Woman's Aboriginal Corporation, National Aboriginal and Islander Legal Services Secretariat, and the New South Wales Aboriginal Land Council remained in the meeting with participating member states. It was unfortunate for the representation of Nungas who are unable to participate due to a lack of resources, that the voice of protest and support for all of those who walked away from the process went unheard.¹⁷⁹ At that meeting strong submissions were made stating that the Declaration in its current form was a document that expressed the 'minimum standards' required for urgent adoption by the General Assembly for the protection of indigenous peoples. They stated that these minimum standards were essential for the survival of indigenous peoples, and that a further derogation from these standards would not only render the Declaration meaningless but would hasten the looming genocide and ecocide facing indigenous peoples.

At the CHR Working Group meeting in November 1998 opposition to the inclusion of the right to self-determination in the *Declaration on the Rights of Indigenous Peoples* was expressed by some member states. The United States preferred the terms 'self

¹⁷⁸ Commission on Human Rights Resolution 1995/32 of 3rd March 1995.

¹⁷⁹ See Aboriginal Statement on the *Draft Declaration on the Rights of Indigenous Peoples*, to the CHR Intercessional Working Group on the *Draft Declaration*, at the second session 21-October – 1

empowerment' or 'self management' to self-determination, terms that have no meaning in international law.

It is hard not to be cynical about the UN process; Jimmie Durham simply states; "Instead of Human Rights we have the more specialized and esoteric 'rights of Indigenous People.'"¹⁸⁰ Rights established to contain our colonised existence, within the boundaries set by the coloniser.

4.14 Peoples not Populations

Tanganekald means the people of the land. In our languages we called ourselves people, we did not refer to ourselves in terms of population statistics, we are more than a statistic that is kept by the coloniser.¹⁸¹

In her address to the Vienna Human Rights Conference in 1993 the chairperson of the WGIP Erica Daes said the following:

Indigenous peoples are varied and distinct societies with the same essential humanity and rights as other peoples. It should be also mentioned that the term "Indigenous Peoples" is already a term of contemporary international

November 1996, on Friday the 25 October 1996, can be located at; <http://www.hookele.com/netwarriors/96/aboriginal.html>.

¹⁸⁰ Durham Jimmie 1990:13.

¹⁸¹ Churchill, W, Ibid:197, discusses the languages of North American Indians and concludes that the indigenous description of the self translates as peoples, the following terms indigenous to Australia, for example, Tanganekald, Kauma, and Narrunga all mean the people of a distinct geographical territory, speaking a distinct language, with a distinct law, and culture.

law. Accordingly, I implore you not to speak with the dead voice of the Nineteenth Century on this issue, but to adopt the term 'Peoples.'¹⁸²

The conference did not adopt the term "peoples", instead the final *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, in Vienna, 25th June 1993, referred to indigenous peoples as "persons belonging to national or ethnic, religious and linguistic minorities".

The muldarbi, continues to impose their will to define us as choose to determine. That is our reality, to know ourselves in the midst of genocide and the rhetorical facade of the caring and sharing state and international community. From the beginning UN studies and reports on the situation of Nungas have been defined in terms of Indigenous Populations.¹⁸³

The UN Working Group name has been subverted through Nungas asserting a right to self-determination in the naming of the group as 'peoples' and not 'populations. As a result the WGIP is more commonly known as the *UN Working Group on the Rights of Indigenous Peoples* and not Populations, the name it was established under by the CHR, but nevertheless the name has not yet been officially amended from 'populations' to 'peoples'.

The word peoples invokes identifications and the recognition of rights mentioned in UN Treaties; 'All peoples have the right of self-determination.'¹⁸⁴ So who are we?

¹⁸² Daes, Erica – Irena, speaking at the 1993 Vienna Human Rights Conference, on the 18 June.

¹⁸³ See for further discussion Crawford, James, 1987:11.

¹⁸⁴ In the preamble to the UN Human Rights Charter Article 1 (1).

The dominant view would label indigenous peoples as ethnic minorities.¹⁸⁵ Richard Falk argues that 'Indigenous peoples ... have not even participated in the 'self' that is being accorded the right to determine its destiny.'¹⁸⁶ In the *International Labour Organisation Convention 169*, it expressly refers to 'indigenous and tribal peoples', however Article 1 (3) of that convention states:

The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The term 'indigenous people' can also be found in reference to the rights of indigenous children in Article 30 of the 1989 *UN Convention on the Rights of the Child* and also there is an emphasis on indigenous peoples expertise found in Article 21 adopted by the Rio de Janeiro UN Conference on Environment and Development.¹⁸⁷

4.15 Who's your People?

This question is common to Nunga protocol: 'who's your people?' Who our family is and what country we come from is central to the identity of who we are. Nungas generally reject the need for definition, on the grounds that only indigenous

¹⁸⁵ See Anaya, J, 1990:837, who describes indigenous peoples' rights in terms of ethnic or nationality rights claims, and The *Universal Declaration on Human Rights* 1948 which does not recognise the collective rights of peoples or minority groups. Only individual rights to religious, linguistic or cultural activities are recognised, not the group rights. It is in Article 27 of the *International Covenant on Civil and Political Rights* that there is any reference to group rights. The *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, does not recognise any collective rights either.

¹⁸⁶ Falk, Richard, 1988:27.

¹⁸⁷ See Kingsbury, B, 1995:33 for further discussion on 'peoples' in international law.

communities have the right to determine their own members. Ward Churchill argues that how a group sees itself is vital to the group's survival; the naming of the group has the impact to 'define the conditions under which the group will live'. Naming impacts upon the future destiny of the group. Calling Nungas tribal is demeaning, relegating us to a permanent state of primitivism.¹⁸⁸ Many indigenous groups are still referred to as tribes and often themselves adopt the term, thus internalising the colonial process of subordination. 'Tribe' is defined as follows:

A group of persons forming a community and claiming common ancestry...A particular race of recognized ancestry; a family.. the families of communities of persons having the same surname.. A race of people; now especially to a primary aggregate of people in a primitive or barbarous condition, under a headman or chief.¹⁸⁹

So 'tribe' is relegated to a place of primitiveness, to be of a 'tribe' is to be a primitive group living in barbarous conditions. I view living in balance with the natural world as highly evolved, a life-way that our old people come from. It is now a stage we are working towards, to walk into the future of Kaldowinyeri.

The word 'people' is defined as:

A body of persons composing a community, tribe, race, or nation: -Folk. Sometimes viewed as a unity, sometimes as a collective....The persons belonging to a place or occupying a particular concourse, congregation, company, or class. Those to whom any one belongs: the members of one's tribe, clan, family, community, association, church, etc collectively. The

¹⁸⁸ Churchill, W. 1994:293-295. See also Otto, Diane, 1995:82.

¹⁸⁹ Definition in the Oxford English Dictionary.

common people, the commonality... The whole body of enfranchised or qualified citizens, considered as the source of power; especially in a democratic state, the electorate... Men or women indefinitely; men and women; persons, folk.¹⁹⁰

In most indigenous languages the word used to describe the identity of the collective group translates to mean people.¹⁹¹ Tangenekald means people of a specific region, with our own language, culture and laws. Churchill discusses the importance of a people's right to self-identification, and by defining who and what is indigenous people and culture we are 'naming ourselves' and 'we name our destiny'.¹⁹²

In asserting our name as peoples we are stating who we are now but we are also stating our place in the future survival as indigenous peoples. As peoples we assert what is proper in terms of our international status, that is, as nations in international law. The Oxford English Dictionary defines 'nation':

An extensive aggregate of persons, so closely associated with one another by common descent, language, or history, as to form a distinct race or people, usually organized as a separate political state and occupying a definite territory. In early examples the racial idea is usually stronger than the political; in recent use the notion of political unity and independence is more prominent ... a country. The whole people of a country, ..in contrast to some

¹⁹⁰ Oxford English Dictionary definition of people cited in Churchill, W, 1994:297.

¹⁹¹ Treating Nungas as members of a minority population group, would be to fail in the recognition of our claims which are essentially *collective* in character. Minority population rights have been seen to result from the exercise of individual rights to freedom of association.

¹⁹² Churchill 1994:331.

smaller or narrower body within it [such as a community, clan, family or “tribe”].¹⁹³

Defining indigenous peoples as nations is met with reluctance from both non-indigenous and indigenous peoples. However the reasons for reluctance are different. Churchill reviews comments made by what he calls ‘Euro – American academics, who view our identification as nations as an ‘exercise in “revisionism,”’ an attempt to become what we never were. And from the other side, to that of indigenous “leaders” the term nation is viewed as having the effect of negating our identity as “natural peoples.”¹⁹⁴

As first nations we are different from those nation states that sit in the UN, we do not consume all that lies in our path. For example the ‘Australian nation’ asserts a legitimacy that was gained through the consumption of our lands and lives and the first nations who have since perished in the path of genocide. They eat us to become the nation state they assert they are. As the people of the land, carriers of the law, we have an obligation to assert our identity as the first nations peoples, even though the interpretation of nation is theirs, not ours. Because to identify as any less than the peoples and nations we have come from in Kaldowinyeri would be to accept a place that is demeaned and marginalised.

The territories that are ours are deemed the territory of the Australian state, so that for us to be who we are means that ultimately the muldarbi must disappear, to become

¹⁹³ Cited in Ibid:299.

¹⁹⁴ Ibid:300-301.

like us naked in law. Jimmie Durham speaks of the identity of the United States and its future:

...criticism in the United States must ultimately depend upon the 'American'-ness or the 'Un-Americanness' of the project being criticized; it must rely on ideology and state-ism. Can we assume from that there is no U.S. except its ideological and expansionist state-ism? The question is not meant spitefully. I once explained 'American Indian' legal rights and the consequent demands of the American Indian Movement to a member of the Institute for Policy Studies. His response was: 'That would mean the break up of the United States'.¹⁹⁵

¹⁹⁵ Durham, Jimmie. 1990:9-10.

DRESSED TO KILL

5.1 INTRODUCTION

"Jangga meenya bomunggur,the smell of the white man is killing us."¹

The 'law' has sustained Nungas since time immemorial. The presence of hundreds of Nunga first nations at the time of Cook's landing is evidence of law embracing diversity and difference. Cook violated the laws of the Eora people when he and his crew stepped ashore in 1770. The violations since then have never stopped. I have listened to stories of the time when Cook first landed. 'He come into the country the wrong way',² and when he landed it was a violent beginning. Surrounded by his crew, the Eora people were murdered by the blast, from bombs secretly laid while the people greeted Cook and his companions.³ Before the Eora were able to initiate the welcoming ceremony and teach the newly arrived the law of the land, the law was violated, as was the peace.

The failure by Cook to enter the law and the ceremony of the land has been followed by millions of others not indigenous to our country. Their relationship with Nungas remains unresolved business. The genocide that has followed the invasion of 'Australia', could have been avoided if Cook and all that followed entered into the

¹ Bates, Daisy, 1947:80, recorded the comment of a dying Nyungar.

² Kevin Buzzacott speaking at the La Perouse meeting Invasion Day January 26th 1988.

law and ceremony of the land. The law and the ceremony of the land is the same agreement with the creator that our old people before us had entered into. The holders of the law, the first nations peoples' struggle to comply with the 'law' against the constant and continuing violations by the muldarbi. What it feels like for indigenous peoples to be immersed in this struggle is described by the following statement made in 1884 by the chiefs of Gitwangak, a Gitksan village:

We would liken this district to an animal, and our village, which is situated in it, to its heart. Lorne Creek, which is almost at one end of it, may be likened to one of the animal's feet. We feel that the whiteman, by occupying this creek, are, as it were, cutting off a foot. We know that an animal may live without one foot, or even without both feet; but we also know that every such loss renders him more helpless, and we have no wish to remain inactive until we are almost or quite helpless.⁴

The spread of the coloniser across our ruwe is remembered:

First time Kartiya (Europeans) bin come in bush, in desert, my mother still young. She have me inside. They bin have ceremony - all the mothers, having ceremony for son. One old man, my grandpa, he bin come back from hunting. He bin see Kartiya with women, and big mob stockman (Aboriginal). He bin get real angry. He worry for them women. Stockmen they bin say to my grandpa, 'Hey, old man, don't throw boomerang. This Kartiya is no good, he too cheeky'. My grandpa he bin say to Kartiya, 'What you after? This is

³ Oral history of the Eora people, carrier of the story Keith Smith pers communication to myself and others in Sydney 1974.

my wife. Leave em!’ “No!”, that Kartiya bin say. Then my grandpa throw boomerang at that Kartiya. Kartiya bin get em rifle, and bin kill my grandpa. From there that Kartiya keep going, look around for more people. Go find another people, another place. Find another ceremony. They bin get up look. “Hallo, who come?” Some women they bin run to hill, keep watching, “What’s that? Might be devil there”. My mothers they bin run to hill. That Kartiya he bin take people away, take ‘em away for good.⁵

And others have sung those not indigenous to our country into their songs;

Ngaa...now then
 mist which lies across the country
 a bulldozer nosing into Guymauy-nginbi
 dynamite which exploded
 the place becoming cleared
 mist which lies across the country
 a bulldozer nosing into Guymay-nginbi
 dynamite which exploded
 Ahh...
 my father’s father’s country
 I had to sing about it
 mist which lies across the country
 the place becoming cleared
 a bulldozer nosing into Guymay-nginbi
 dynamite which exploded
 Ahh...mist which lies over the country

mist which lies over the country
 dynamite which exploded
 the place becoming cleared
 I had to sing about
 my father’s father’s country
 dynamite which exploded
 a bulldozer nosing into guymay-nginbi
 mist which lies across the country
 dynamite which exploded.⁶

⁴ In Mills, A, 1995:8 they are the first nations people of the place now known of as British Columbia Canada.

⁵ Interview with Tjama Napanangka, for the Ngardi-Kukatja people, in De Ishtar, Zohle, 1994:140-141.

⁶ Song of Paddy Biran’s in Dixon and Duwell 1990:X111.

The post - invasion history of Australia, is a story of genocide. Aboriginal nations have been 'extinguished', along with our languages, cultures and laws. Survivors of genocidal massacres were rounded up and removed from their ruwe and relocated hundreds of kilometres away from their country and spirit ancestors. They were detained on concentration camps officially and more popularly known as reserves or christian missions, left to await death or absorption into mainstream Australian culture. Whichever came first. The living conditions on these institutions were inhumane, they failed to provided adequate food and water supplies, and diseases were easily spread through their infected small-pox blankets. Conditions were deliberately inflicted and calculated to bring about our destruction.

Indigenous peoples were herded like sheep to these concentration camps.⁷ The following statement illustrates the genocidal intent of some early members of Parliament:

...reserves would be constantly increasing in value, and when the last of the aborigines had died they would become a valuable heirloom to the colony...proceeds of the rents should be devoted to the support of the aborigines themselves and in course of time, when the race had died out the funds might be made equivalent to the departmental expense of the Government.⁸

The colonial state and its police forces dispersed the Nungas who continued to re-group and gather in the ceremony of ruwe. The muldarbi strategy of relocating

⁷ See Purdy, Jeannine, 1996:45-49, for the history of the violent establishment of the Western Australian colony, at p 46 Purdy writes, 'When Aborigines were not killed outright, they were taken captive and sometimes made to walk hundreds of miles chained together'

Nungas to country hundreds of kilometres away from their traditional territory and also the separation of families was a strategy used by the coloniser to break down the law. They stopped the singing up of the country by killing the song holders and moving those who survived the genocide to country that was of no lawful or cultural significance to the songs they carried.

5.2 The theory of emptiness: terra nullius and genocide

Eurocentric ideas of emptiness were used to justify the belief held by the west, that a space existed for their invasion. In filling that space they have argued that there was no violation of first nations' sovereignty. The Australian landscape empty of Nunga people and laws is an idea which is rooted deeply in Australia's colonial history, so deep that it remains today entrenched in Australian law and governance; it is the founding theory for their theft of our homelands, a territory they call Australia.

As their genocidal practices and policies drew blood, and drastically reduced the Nunga population, we became their truth, and in their eyes invisible. They created their own colonising myths of emptiness, while in the real world massive depopulation was caused by diseases deliberately introduced. The colonisation of the Americas and Australia involved maybe our earliest evidence of the use of biological

⁸ Hall, G, Parliamentary Debates, 28 August 1866, S.A. Legislative Council, p219.

warfare in the war game.⁹ "The Americans were not conquered: they were infected."¹⁰

The same thing happened in Australia.

The "founding fathers" rule of terra nullius nurtured the myth of invisibility, growing up to become a dominant muldarbi. Nungas and our laws were invisible to their eyes, only our ruwe was visible:

Particularly with respect to a colonized people, the conqueror's law and legal doctrine permit him to peacefully and in good conscience pursue the same goals that were formerly accomplished by the sword with imperialistic fury. Further, ...the conqueror's law quite often achieves a highly efficient, hegemonic function. The territorial, social, economic, ideological and other forms of colonization facilitated by that law come to appear as inevitable historical necessities, rather than deliberate acts of genocide, to the subjugated peoples.¹¹

The land is full of law, and is occupied by many indigenous first nations, speaking hundreds of different languages. To call Australia 'terra nullius' exposes not only Eurocentric racist and superior attitudes, but also reveals the "colonial illness-schizophrenia". Terra nullius is a lie that denied the reality of our ancestors' existence. The lie legalised the denial of our existence; we 'become' non-peoples in the rules of the muldarbi. These rules have birthed a genocide which blankets the Australian landscape.

⁹ Butlin, N, 1983:13-25, discusses the evidence for the deliberate spread of small – pox in North America and the evidence for a similar pattern emerging in Australia.

¹⁰ Blaut 1993:186.

¹¹ Williams, R, 1986:225.

Following the *Western Sahara* decision terra nullius became less useful as a tool of colonialism;¹² it was no longer viewed as a ‘proper’ and legitimate basis for the common law to assert sovereignty of the Australian state.¹³ It was seen as antiquated and racist, a colonial relic. Australia was to become increasingly a source of embarrassment as the voices of Nungas rose within the UN to expose the extent to which the Australian legal system remained underpinned by the rule terra nullius. The political lobbying of Nungas at the UN during the mid 1980s and early 1990s actively sought the support of member states to obtain an advisory opinion from the International Court of Justice on the application of terra nullius to Australia. It was only a matter of time before the Australian judiciary and government would camouflage terra nullius. The removal of ‘terra nullius’ from the law language of Australia did not involve the removal of the muldarbi but it involved a further layering of the muldarbi known by new doctrines as, ‘extinguishment’ and ‘native title’.

The High Court decision was celebrated as an initiative in reconciliation, for overturning the application of terra nullius to Australia’s law of real property. It was however a false beginning. The court did not reject entirely the terra nullius doctrine, because a complete rejection would have led the court to question the legitimacy of the British invasion and occupation of what they came to name ‘Australia’. The High Court instead decided the British Crown’s acquisition of sovereignty over the Australian colony was an ‘act of state’, one not to be challenged in any Australian

¹² *International Court of Justice Reports* 1975:12.

¹³ See Brennan J, *Mabo v Queensland*, (1992) 66 ALJR :408, 421-422.

court.¹⁴ In reaching this conclusion the High Court legitimised the theft of our continent, and excused genocide, and the rape and plunder of both Nunga and ruwe.

Wiradjuri barrister Paul Coe pointed out the thinking behind the High Court and compared it with the state of Germany during the tyrannical rule of the Nazi party. The same justification - an 'act of state', was used by the Nazis in the attempted genocide of the Jewish peoples.¹⁵ The High Court has merely closeted terra nullius, and taken off the hanger the 'act of state' doctrine, to replace it. The legal theory of terra nullius has remained intact. The real death of terra nullius would have dismantled the Australian legal system. Paul Coe challenged the High Court decision in the following statement:

It is like the logic that went with the Third Reich when they [the Nazis] started killing, when they started using force to take other people's land and territory. And then to justify it in the name of the state so that acts of state were above and beyond question....They have not applied international law. They have not applied the ...Nuremburg War Crimes Tribunal ...the allied powers...said that an 'act of state' does not justify genocide, mass murder or using war to acquire territory.¹⁶

Terra nullius is not dead, the consequences and continuing impact of terra nullius surround us all. Its impact is found in the violations of our law, ecological destruction of our lands and waters, dispossession from our territories and the colonisation of our

¹⁴ *Mabo v Queensland (1992) 175 CLR, 1:31-35 and 78.*

¹⁵ Coe, P, 1993:9.

¹⁶ Ibid.

being. Terra nullius has not stopped; the violations of our law continue, the ecological destruction of the earth our mother continues with a vengeance, we are still struggling to return to the land, and the assimilator - integrator model is still forced upon us. This is terra nullius in its practical and continuing application. There is no death of terra nullius. Its life is my struggle against extinguishment: the end of struggle against extinguishment would be the death of terra nullius.

The celebration of the death of terra nullius is a farce: a collective act of schizophrenia, a false-hood, and a conspiratorial lie, which has lulled the Australian psyche into a fantasy myth that there had been in the *Mabo (No 2)* decision an act of recognition of indigenous peoples' rights. Let us not forget whose interests the courts of a colonial creation were developed to serve. Joyce Green reminds us with clarity when writing on the situation in Canada:

The outcome in *Delgamuukw* and other cases in which land title is contested between indigenous and colonial authorities is preordained by the fact that the law, and the courts that interpret and administer such law, are colonial emanations and constructs. They are rules of the ruler, interpreted by the ruler through the lens of the selective, racist history. They construct the 'settlement thesis' premised on assumptions that colonizing populations were inherently superior to the indigenous as measured on a quasi-evolutionary linear progression of human development, and that the more 'advanced' society is entitled to claim political supremacy which benefits the 'primitive' societies with accelerated development.¹⁷

¹⁷ Green, J, 1995:90.

The High Court in creating the rule of extinguishment provides for the living embodiment of terra nullius:

Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.¹⁸

common law native title, being merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land, was susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which was inconsistent with the rights under the common law native title.¹⁹

The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession.²⁰

The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant. Native title is liable to be extinguished by laws

¹⁸ *Mabo v Queensland (1992) 175 CLR 1*: 69, per Brennan J.

¹⁹ *Ibid*:89 per Deane and Gaudron JJ.

²⁰ *Ibid*:110 per Deane and Gaudron JJ.

enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it.²¹

It is the peculiarity of the legal rights conferred by ...statutory leases...which permits the possibility of co-existence of the rights under the pastoral lease and native title. Such would not be the case where an estate or interest in fee simple had been granted by the Crown. Such an interest, being the local equivalent of full ownership, necessarily expels any residual native title in respect of such land.²²

And the new High Court breathes further life into the muldarbi. In *Fejo v Queensland* Gleeson CJ laid down the rule:

The references to extinguishment rather than suspension of native title rights are not to be understood as being some incautious or inaccurate use of language to describe the effect of a grant of freehold title. A grant in fee simple does not have only some temporary effect on native title rights or some effect that is conditioned upon the land not coming to be held by the Crown in the future.

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence

²¹ *Wik People v Queensland*, (1996) 187 CLR : 84 per Brennan CJ

of the traditional laws and customs is a necessary pre-requisite for native title but their existence is not a sufficient basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish, but merely suspends, native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.²³

Who are we now in the muldarbi's field of vision? Are we Nungas without a homeland, extinguished to what degree? The rule terra nullius contained and managed the genocide, the genocide continues in newer forms just as terra nullius is embodied in new forms.

5.3 Genocide where it is?

The muldarbi Britain came bearing genocide and in the beginning genocide was overt, the killing fields were open, genocidists were rewarded and viewed as heroic. Now the practice is covert, invisible, and more difficult to isolate and name. White Australia dismisses the word genocide; its place in Australian history and contemporary life as an emotive response. The word genocide is more easily applied to the mass murders committed by Nazi Germany²⁴ and more recently to the genocide in Rwanda, and 'ethnic cleansing' of Bosnia. When genocide is spoken by us about

²² Ibid : 250, per Gummow J.

²³ *Fejo v Northern Territory of Australia* (1998) HCA 58 (10 September 1998) <http://www.austlii.edu.au/au/do/disp.pl/au/cases/cth/high_ct/1998/58.html> per Gleeson CJ, paragraphs: 45-46.

²⁴ In the extermination of those the Nazis viewed as sub-human, were the Jews, Poles, and Slavs.

us, it is held demeaned, as being too angry and out of control. There is a denial²⁵ of the word being lived and practised:

denial remains the norm. Otherwise progressive whites still seek at all costs to evade even the most obvious correlations between their own history in the New World and that of the nazis in the Old. A favourite intellectual parlor game remains the debate over whether genocide is “really” an “appropriate” term to describe the physical eradication of some 98 percent of the continent’s native population between 1500 and 1900. “Concern” is usually expressed that comparisons between the US governments assertion of its “Manifest Destiny” to expropriate through armed force about 97.5 percent of all native land, and the nazis’ subsequent effort to implement what they called “Lebensraumpolitik” – the expropriation through conquest of territory belonging to the Poles, Slavs, and other “inferior” peoples only a generation later - might be “misleading” or “oversimplified”.²⁶

At its thirty-ninth session, in 1982 the *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, declared that acts of genocide were being committed in various regions of the world.²⁷ Meanwhile the Australian judiciary and governments name the continuing genocide in Australia in other ways, such as ‘the Aboriginal problem’. The contemporary face of genocide is the native title extinguishment policy, and the Nunga profile of the state welfare child, the imprisoned juveniles and adults, the mental health patient, the generations born into

²⁵ The multi-national corporation Daishowa, was successful in a defamation action in Canada against a support group of the Lubicon Cree, for their use of the word ‘genocide’ to describe the situation confronting the Lubicon in their efforts to stop destructive developments on their lands.

²⁶ Churchill, Ward, 1994:245.

assimilation, the tortured victim of racist police, the chronic state of the ill health of many.²⁸ The state in refusing to speak of the genocide instead uses other words which nullify any obligation to cease the genocide or to compensate Nungas for the destruction of life. The assumption is that, if you don't have Auschwitz-style extermination centres, you don't really have genocide. And yet the missions or reservations performed the same function as a Nazi concentration camp, with the same purpose, to constrain and cause the death of Nungas. The full bloods were to die, the mixed blood was to provide a servant class that was ultimately to become absorbed into whiteness.

There is a relationship between the destruction of the land and indigenous people; where genocide has occurred we also see the destruction of the natural environment. The two words genocide and ecocide are one in their destructiveness and impact upon our life. Without the natural world, what is it the people become? Our obligation and role as custodians of the law and the land are destroyed with the destruction of the natural world. So it is that the idea of genocide, when it applies to indigenous peoples becomes a much broader concept, the destruction of the people comes with the destruction of the natural world.

Ward Churchill discusses how the word genocide evolved:

²⁷ This is found in resolution 1982/2 7th September of the Commission on Human Rights adopted resolution 1983/24 of 4th March 1983.

²⁸ ABC Newslink 'Aboriginal groups say health is still appalling' Wednesday 21 April, 1999. The Council of Community Health Organisations say there has been one death a month since January this year on Aboriginal town camps near the mining town of Newman, in Western Australia's north. They say people at Capricorn and Parnpajinya are ending up in hospital with emphysema and pneumonia, because there is no water, sewerage, toilets or housing. Council executive member Margaret Colbung says they have been told by the State Aboriginal Affairs Department that there are no humanitarian grounds for help.

The meaning of the term, coined by the Polish jurist Raphael Lemkin in 1944, is very much broader, both in temporal scope and in terms of the techniques employed. Although the word itself was constructed by combining the Greek *genos* (“race” or “tribe”) and the Latin *cide* (“killing”), according to Lemkin it describes a process considerably more multifaceted and sophisticated than simple mass murder.²⁹

Lemkin comments on the nature of the crime of genocide:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, *except when* accomplished by mass killing of all the members of a nation. It is intended rather to signify a coordinated plan of different actions aimed at destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of personal security, liberty, health, dignity, and the lives of individuals belonging to such groups. Genocide is the destruction of the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity but as members of the national group.³⁰

Lemkin observes two phases of genocide, one the destruction of the national pattern of the oppressed group, and the other, the imposition of the national pattern of the

²⁹ Churchill, Ward, 1994:12.

³⁰ Ibid cited :13.

oppressor.³¹ Genocide is the deliberate policy to destroy a group of people. The *International Convention on the Prevention and Punishment of the Crime of Genocide*,³² Article 11 of the Convention describes the following acts against a “national, ethnical, racial, or religious group”, as a commission of the crime genocide:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group
- e) Forcibly transferring children of the group to another group

Under Article 111, the Convention makes the following acts punishable:

- a) Genocide
- b) Conspiracy to commit genocide
- c) Direct and public incitement to commit genocide
- d) Attempt to commit genocide
- e) Complicity in genocide

Indigenous peoples of Australia suffered all of the above abuses. The assimilation policy and the forced removal of Nunga children are examples of genocide which still continue today. Aboriginal children were being taken away from their families and communities until the mid 1960's, and while the *Aborigines Acts* have been repealed Nunga children are still removed from their families through processes of

³¹ Ibid.

³² The UN General Assembly Resolution 260A 111, 9th December, 1948, became effective on the 21st January 1951.

criminalisation and welfarisation. The new way genocide is actioned is not so overt; it happens in more subtle forms.

The crime of genocide is recognised by customary international law as a violation of the law of nations; it is a universal crime of universal jurisdiction. The Australian Government ratified the *International Convention on the Prevention and Punishment of the Crime of Genocide*, on the 8th July 1949, through the *Genocide Convention Act 1949 (Cth)*.³³ However it has been decided by the courts that while the Australian government is a party to an international convention, that is not sufficient to give rise to rights and obligations under Australian law.³⁴ An Advisory Opinion of the ICJ described the principles underlying the *Genocide Convention* as ‘principles which are recognised by civilised nations as binding on States, even without any conventional obligation’.³⁵ However the Australian state rejects the idea that it has jurisdiction to prosecute for the crimes of genocide committed against Nungas since 1788. The denial of the crime of genocide is genocidal in itself. The judicial officers of the common law who deny there is an ongoing crime of genocide because the *Genocide Convention* is not a part of the domestic law of Australia are themselves complicit in the crime of genocide.

³³ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168:224., the court held that ratification alone is not sufficient to bring the law into the domestic jurisdiction of the Australian common law, further legislation is required.

³⁴ See Mason CJ and Deane J in *Minister for Immigration v Teoh*, (1995) 183 CLR 273, 286-287. *Chow Hung Ching v The King* (1948) 77 CLR 449, 478-479, Dixon J said, “ a treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty’. The same view is expressed in *Koowarta v Bjelke Petersen* (1982) 153 CLR 168, 224-225 Mason J.

³⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) ICJ 15 at 23.

However, while the Australian state refuses to acknowledge its international obligations by enacting legislation which would bring the *Genocide Convention* into domestic law, Nungas affirm that we are peoples, we have an international identity, and we are not subjects of the domestic law . Our relationship with the Australian state is an international one. The crime of genocide against Nungas should be heard as a matter between the Australian state and the first nations peoples. The jurisdiction is international. The conflict between Nungas and the state is a conflict of international law. The crime of genocide which is ongoing against the first nations of Australia is committed by a state signatory to the *Genocide Convention*. Australia is in violation of the Convention.

There is a field of law that is a composition of Aboriginal laws, international customary laws and the common law of the Australian state which could be invoked to stop the genocide. This field of laws is what we draw upon when considering rights and obligations. The High Court in *Mabo (No 2)* considered contemporary evolving human rights international standards, and Brennan J made the following comment on the influence of international standards on the common law rights to property of Nungas:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of the *Optional Protocol to the International Covenant on Civil and*

Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.....However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.³⁶

It is where the field of law intersects that a mergence of law takes place. At that point the common law has the opportunity to evolve and grow in its capacity to become more humane and in its place with the natural world and the cosmos. Although the above comments by Brennan J are encouraging, there is a rider. The mythical skeletal principle which I referred to in chapter 3, lies waiting in the wings to undo any radical departure into the light of human rights.

In *Re Thompson, ex parte Wadjularbinna Nulyarimma and Ors*,³⁷ members of the Aboriginal Tent Embassy in Canberra and representatives of Nunga first nations began proceedings in the Magistrates court of the Australian Capital Territory, (ACT)

³⁶ *Mabo v Queensland (1992) 175 CLR, 1 : 16*, per Brennan J, who is not without Aboriginal support (Noel Pearson has been a staunch crusader for the High Court decision) see the following quote from Pearson in *Yunupingu 1997: 151*, “.I am a great believer in the imperative of those charged with developing the common law to redouble our efforts when injustice looms inevitable and unavoidable, to ever refine its rules and to strive to locate the justice and balance which frequently only remains to be found. This imperative remains as long as, to paraphrase His Honour Justice Brennan (as he then was) in the *Mabo (No 2)* decision, the skeleton of the common law, which gives it its internal logic and consistency, is not fractured.’ Whereas Bird G 1996:104 argues that while ‘ the legal system is dressed up in the language of objectivity and neutrality, .its ‘skeletal framework’ privileges white versions of history and legality.

³⁷ (1998) ACTSC, 136, Crispin J, 13 December 1998. This decision is currently subject to an appeal to the Full Court of the Federal court.

claiming that the Prime Minister of Australia John Howard, and other federal parliamentarians were complicit in acts of genocide by enacting the amendments to the *Native Title Act 1993*. It was submitted to the court that the amendments would perpetuate the ongoing cycle of genocide. The magistrate held there was no crime of genocide known to the common law. The applicants then made an application for a writ of mandamus before the ACT Supreme Court, to direct the magistrate on whether or not there was a crime of genocide known to the common law. Arabunna elder Kevin Buzzacott spoke to the court about how Koori peoples still carry the law, or in his words; 'the key to this country'.³⁸ Kevin Buzzacott advised the court that he had joined the genocide action because of his obligation to the law of his Arabunna country of Lake Eyre in the north of South Australia. In protecting the law from further violations we are engaged in constant conflict, and as Kevin Buzzacott explained to the court, '...we are on the brink of war with your system of laws, a system of laws which continues to oppress and bring death to our families and communities.'³⁹ Crispin J decided that even though the evidence before him showed there was genocide committed against Nungas, there was no crime of genocide known to the laws of the ACT.⁴⁰

For present purposes, it is unnecessary for me to determine whether the particular conduct to which he referred would have been sufficient to sustain charges of genocide if such an offence formed part of the domestic law of Australia there is ample evidence to satisfy me that acts of genocide were committed during the colonisation of Australia.⁴¹

³⁸ I have included an extract from the court transcript of Kevin Buzzacott in chapter 2.

³⁹ (1998) ACTSC 136, Transcript of evidence from Kevin Buzzacott before Crispin J, 14th September 1998.

⁴⁰ (1998) ACTSC, 136 Crispin J, 13 December, 1998, paragraphs: 69 and 72.

⁴¹ (1998) ACTSC, 136, Crispin J, 13 December 1998, paragraph: 78.

Why did the prosecutors in the ACT genocide case consider the *NTA 1993* and its 1998 amendments to be genocidal? Kevin Buzzacott spoke of his lawful obligation to care for country, an obligation which is violated by the *NTA 1993*, its rule of extinguishment and the validation of non - native title. The act establishes a process for the negotiation of native title agreements, many of which are in violation of custodial obligations. A native title agreement finalised during 1998 involved some members of the Adnyamathanha people in an agreement on the development of the Beverly uranium mine. The agreement violates the law because the mine will damage the ruwe, and its laws. I understand that these developments would be given the approval by the state government in the absence of any Nunga involvement. However the nature of these developments - the mining of uranium, and other proposals in this region - the building of a space base at Woomera, and the development of a nuclear waste depository site, are all developments that have potential long - lasting detrimental impact. To seek the consent of traditional owners in processes which are in violation of our laws is to seek our consent to genocide. The outcome will be killing the ruwe, the people, the culture and our law ways. The fact some members of the group have agreed to the genocide does not excuse the genocidists, it merely illustrates the extent to which the life of Nungas is contained within the belly of genocide itself. The relationship we have to the land was given to us by the Creator; this is our ultimate authority, it is this creative process which determines final outcomes. Our rights and obligations cannot be extinguished through the imposed rule of terra nullius or the contemporary process of negotiating muldarbi deals that gives consent to our own genocide.⁴²

⁴² The native title claim of the Adnyamathanha was the first claim to be registered in South Australia. Registration of their claim in March of 1999 gives them the 'right' to negotiate. Within a month the

The ACT genocide case heard extensive evidence of the trauma and serious mental harm caused to Nunga communities throughout Australia, as a result of dispossession and damage to our ruwe. Land relates to every aspect of our being. Our relationship to land is central to our life; the severance of this relationship is in itself an act of genocide, an act supported by the *NTA 1993*. The legitimacy of this legislation in one sense is similar to the way that terra nullius was considered a valid and legitimate basis upon which to dispossess Nungas from their territories for two centuries. The *NTA 1993* comes to fill the vacuum left by the 'white out' of terra nullius from Australia's laws of property through its validation of European invasion and land theft. The impact of the *NTA 1993* and its amendments is to systematically impose conditions of physical or underlying psychological harm upon Nungas. The intent of the genocidists is to make things so uncomfortable for people that they will 'voluntarily' disassociate themselves from the group in order to avoid the consequence of membership, bringing about group dissolution. Many Nunga individuals and communities have expressed the trauma they are experiencing from the pressures imposed upon them by the native title process.

When Nungas raise the issue, of our right to have the genocide stopped and the right to be compensated for the trauma we have endured, we are responded to by a legal system which views causation as being from one individual action.

It is clear that John Howard and many others 'refuse to feel guilty' exactly because they deny personal responsibility or any causal connection for what happened in the past. But the relationship between past action and present responsibility is in fact more complicated than such a straightforward

sylllogism might imply. It is not self-evident to assume that a denial of reparation flows from a denial of guilt. 'Inter-generational guilt' is not an impossible concept. The children of a bank robber are not guilty of theft; but neither are they entitled to live off illegal earnings with impunity: that debt must still be repaid. It is a principle that we express not only in law (see for example, *Proceeds of Crime Act, 1987*) but in ethics, as for example over the issue of the return of Jewish property, land, money, and art, confiscated by the Third Reich. Likewise, although it was previous generations of white Australians who were *guilty* of the theft of Aboriginal land through the ideology of terra nullius, their descendants continue to reap its benefits. The present-day privilege of white Australians has been built upon the guilty acts of their predecessors.⁴³

The citizens of Australia are like the children of bank robbers left to freely spend the spoils of the crime and like the descendants of Nazi war criminals left to spend the wealth of murdered Jews. There does exist a connection between the crimes committed in the past. It is in the way Australia lives off the wealth of our ruwe as we continue to barely survive the invasion. Our extinguishment or loss has been your reward. Nungas have a right to expect support from all levels of the judiciary and government to put a stop to genocide; their omission or failure to act invokes that which was expressed by Justice Jackson of the Nuremberg Tribunal, that is, the obligation falls upon ordinary citizens as it did with German citizens, to prevent the crime of genocide occurring. This obligation also falls upon the citizens of Australia, as the genocide continues in the face of most Australian citizens. Not to take action is

environmentalist for its use of leaching methods in the extraction of uranium.

to leave the struggle for the protection of human rights in a place that will become increasingly regressive:

The idea that a state could not itself be the subject of genuine legal constraints, or of a critique in terms of legal values, because the state is itself constituted by the law, is a potentially dangerous idea.⁴⁴

Citizens and the courts hold a responsibility not to blindly uphold the authority of those holding power, but to utilise the jurisdiction of the common law to ensure that human rights standards are maintained and not abused by the state. These are ideals far removed from the current reality of Nungas. Following numerous statements to the court from Nunga peoples from different country.⁴⁵ Crispin J delivered a judgement that retained the muldarbi we have always known, and in doing so revealed his own complicity when he said:

On the contrary, the proper exercise of the democratic function within a multicultural society may frequently involve striking a balance which will involve causing distress to members of particular ethnic groups in order to protect the interests of others. In any event having considered all of the arguments advanced by the applicants and intervenors I have been unable to find any evidence of acts that would give rise to an arguable case against any of the proposed defendants.⁴⁶

⁴³ Manderson, Desmond, 1998:236.

⁴⁴ MacCormick, N, cited in Kerruish, V, 1998:73.

⁴⁵ Evidence before Crispin J was given by Jenny Munroe, Isobel Coe, Billy Craigie (now deceased, a long time campaigner and one of the original initiators of the Aboriginal Tent Embassy. He died shortly after the commencement of the court proceedings), Robbie Thorpe, Wadjularbinna Nulyarimma, Kevin Buzzacott, Mingli Wanjurri Nungala, Alison Hoolihan, Ray Swan, Michael Anderson, and other affidavit evidence was given by those unable to travel to the hearing.

⁴⁶ (1998) ACTSC, 136, Crispin J, 13 December 1998, paragraphs: 79 and 80.

Like Australia, the US judiciary is reluctant to prosecute crimes of genocide⁴⁷ and most other colonial jurisdictions have the same reluctance. We have seen the High Court act as a result of international pressure and seemingly overturn terra nullius in its application to the property laws of Australia. Will the pressure mount again in response to the condition of genocide? Or are there too many muldarbis who would be adversely affected? Do they hold a power which has the capacity to prevent international pressure from mounting?

5.4 Protection, segregation, journey to death

Genocide was maintained and supported by legislation enacted by the states, *Aborigines Acts*. The muldarbi intention was to bring about our destruction as distinct peoples, to bring about the death of the 'full-blood' and the absorption of the 'half-caste', into an overall 'whiteness of being'. Survivors of invasion were rounded up and confined to reserved 'crown lands', called 'Aboriginal reserves', they were institutions used to contain the declining Aboriginal population:

The chief protector was able to restrict any Aboriginal or half-caste to a reserve or institution, or remove them from a reserve or institution. It was illegal for an Aborigine to be removed from his district without permission, and for a non-Aboriginal person to be on a reserve without permission. The chief protector could direct any Aborigines or half-castes who were camped, 'or about to camp', near towns or municipalities to remove to another location

⁴⁷ Churchill, Ward, 1994:23.

as directed. Any individual found loitering in any town or municipality 'and not decently clothed' could be directed to move on.⁴⁸

The *Aborigines Acts of 1911 (SA)* provided the legal framework for the confinement of Nungas onto Aboriginal reserves.⁴⁹ The *Aborigines Acts*⁵⁰ controlled most aspects of Aboriginal life.⁵¹ Nungas were to become institutionalised wards of the state. The *Aborigines Acts* provided for the appointment of Protectors of Aborigines; they were the administrators of the *Aborigines Acts*, administering a system of rules enacted by the states for the popular purpose of the 'protection' of Aborigines. The Aboriginal Protector had total control over the lives of Nungas; we were known as 'protected persons' rather than citizens of our own nations. We were not even acknowledged as citizens of the new colonies (not that we would have wanted to be) even though we were deemed 'British subjects'.⁵² The Protector became the legal guardian of all indigenous children until the age of twenty-one years. All movement of people onto

⁴⁸ Foster, R, 1997:11.

⁴⁹ This Act repealed the *Aboriginal Orphans Ordinance 1844 (SA)* and was modelled on the *Aborigines Act 1886, (Qld)*. NSW enacted the *Aborigines Protection Act 1909*, and the *Aboriginals Ordinance 1918 (NT)*. Tasmania had no legislation of this type as they argued there were no Aborigines left, however they still legislated the *Cape Barren Island Reserve Act 1912 (Tas)* for a place where the survivors of genocidal policies lived as the invisible Tasmanians. The Tasmanian situation illustrates the schizophrenia of the coloniser, in one hand they peddle the myth of extinguishment of the Tasmanian Aboriginal people and in the other they enact legislation to contain the supposed extinguished peoples. The *Aborigines Act of 1910 (Vic)* repealed the earlier *Aborigines Act 1890 (Vic)*. The *Aborigines Act 1897 (WA)* amended the *Aborigines Protection Act 1886* and the *Aborigines Act 1889 (WA)*.

⁵⁰ Under the *Aborigines Acts* the Protector of Aborigines was delegated power by the Crown to determine where Nungas were to reside, custody and education of children, the conditions under which Nunga children were placed in apprenticeship, and the distribution of monies.

⁵¹ In 1890 the SA Protector Hamilton drafted an Aborigines Bill for the protection and management of the 'Aboriginal natives'. The Bill passed on 7 December *An Act to make provision for the better Protection and Control of the Aboriginal and Half-caste Inhabitants of the State of South Australia 1911, (SA)*. The initial proposal to enact legislation modelled on the Queensland *Aborigines Protection Act 1897*, failed in SA. One of the proposals which came before the SA Select Committee was to introduce a permit system to be held by employers of Nungas. It is thought that the *Aborigines Protection Bill* failed mainly because of a successful lobby by pastoralists who were concerned that they would lose the ability to exploit Nunga labour. However the pressure to introduce an Aborigines Protection Act grew. Foster, R, 1997:5, 9.

⁵² For further discussion see Chesterman and Galligan 1997:32-33.

and off reserves was controlled as was the movement of Nungas across their traditional territories, ruwe which was becoming increasingly invaded by pastoralists and farmers. The colonies established reserves, and the round - up and placement of Nungas at these institutions served to provide enclaves of slave labour for the local pastoral and agricultural industries. At a time when slavery was no longer practised within the boundaries of 'law', the *Aborigines Acts* provided a cheap labour force under the control of the Aboriginal Protectors. For their work families received bare survival rations. In deciding where to place Nungas when we were rounded up like sheep destined for one of their concentration camps, no consideration was given to our clan identity or our language group; the colonists displayed complete ignorance and lack of understanding of Aboriginal culture. Confined to 'Aboriginal reserves' Nungas were removed from their traditional ruwe and relocated to other regions, sometimes hundreds of kilometres away. The colonial administration planned our death, or alternatively the total absorption of Nungas into mainstream Australian culture.

The colonist attempted to construct all aspects of our being, even the construction of our death, where they engaged our old people in the digging of their own graves, graves that were frequently filled with empty coffins as the bodies had already been snatched by those who traded in human body parts to sell or display in European museums or wealthy private collections. As towns and settlements expanded more Aboriginal reserves were set aside, outside the town boundaries. The survivors of the initial impact of the invasion were removed to reserves away from the eyes of early settlers, to be rendered invisible.

A policy of segregation involved more than the separation of white from black, it also divided 'half-castes' from 'pure blood' or 'full blood', 'aboriginal natives'. The segregation policy was genocidal, intending the absorption of 'half-castes' into white society. Segregation is based on the idea of the superiority of the dominant culture; it aims at keeping groups separate, unmixed and ranked in a hierarchical position.⁵³

The survivors of the genocidal policies of the coloniser lived to re-tell their stories.⁵⁴ Colonists in their shame glossed over the darkest aspects of colonial history, and tell a different story. Indigenous peoples are rarely mentioned in colonial histories and if referred to, are noted as a dying and disappearing race. The state kept few records of the massacres, - the deliberate poisoning of rationed foods and waterholes and the spread of disease. The archival records which are available provide a sanitised version of history; a reading between the lines is necessary to understand the fullness of this story of invasion and genocide:

Sturt's account of his travels along the Murray (then called the Hume) suggests a significant Aboriginal population in the area. He first met significant groups of Aboriginal people on 6 June, 1838, somewhere between the junctions of the Ovens and Edward rivers with the Murray, probably in the vicinity of the present day towns of Cobram or Tocumwal. He provides numerous references to meetings with Aboriginal groups in the area. He later commented on evidence of a small-pox epidemic. He wrote:

⁵³ See the *Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres*, United Nations publication, Sales No 71.X1V.2, paras. 366-367, and also the *Cobo Report* E/CN.4/Sub.2/1983/21/Add.1 10 June 1983:5.

⁵⁴ It is one of the aims of this thesis to give voice to a voice which has in the past and continues today to be subordinated by the state.

I observed many of them as if pitted by the Small Pox, so that it would appear the disease which was raging with such a fearful effect upon them when I was on the Banks of the Darling in 1828 and of the Hume in 1829, had been universal. It must have committed dreadful havoc amongst them, since on this journey I did not see hundreds to the thousands I saw on my former expeditions.⁵⁵

Georgina Williams speaks of the impact of segregationist policies on the Kaurna People and from her own experiences growing up as a child on Pt Pearce Aboriginal mission station:

At first glance there were an estimated 3,000 and after 20 years of 'settlement' the estimates are that there were 150 of the Kaurna tribe (from the Adelaide Plains), taken to the first SA mission at Poonindie. This is where my grandmother was born, and she was later moved when the government closed down Poonindie. The Kaurna people were dispersed yet again to Port McLeay and Point Pearce, and forced into enclosures where the permit system operated, and we were hand-fed on a starvation diet called rations. Until 13, all my life was spent in that encapsulation. All the things the people took with them, their history, their stories, their songs, were encapsulated with them. We have an oral tradition of the transference of information - didn't use books - and this tradition was systematically closed down, through punishment. The missionaries would withdraw our ration issue for 'practising heathen barbaric

⁵⁵ Cited in Federal Court decision, *The Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Ors* (1998) 1606 FCA, (18 December, 1998) http://www.austlii.edu/au.cth.federal_ct/1998.1606.html, 18/12/1998, p 31.

ways'. No food, you get hungry. Behaviour modification - just like they use in factories today, particularly in the third world.⁵⁶

From first contact with the coloniser we learnt that their rules about 'us' were muldarbi ones, some more overt than others. Their rules were designed to destroy our life as distinct peoples, their rules made a clearing for their new colonial order.

5.5 Assimilation final absorption and the imposition of the national pattern of the oppressor

The dominant society is perceived as being superior and therefore legitimate in imposing itself upon other groups of people. The policy of assimilation is imposed and intended to destroy the culture and society of one group through its total absorption into the culture of the dominant society. The absorption of one group into the other aims to produce one homogenous society. The less powerful group is forced to discard its culture and beliefs, as a condition of their acceptance by the dominant group.⁵⁷

The movement towards an assimilationist policy began in the late 1930's and it remained the official Australian government policy until the beginning of the 1970's.

The state's motive was to assimilate Nungas into the values and belief systems of the

⁵⁶ Williams, G, 1986:28.

⁵⁷ A reference to assimilation policies that states have imposed upon indigenous peoples internationally is referred to in the *Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres*, United Nations publication, Sales No 71.XIV.2. para 370, also cited in the Cobo Report. E/CN.4/Sub.2/1983/21/Add.1 10 June 1983:6. In the *Royal Commission Report into the*

coloniser, the expectation was the disappearance of Nungas into the Anglo-Australian monoculture. Assimilation was defined by the Australian government in 1961 at its Native Welfare Conference:

The policy of assimilation means that all Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, as other Australians.⁵⁸

The permit system or 'exemption' from the *Aborigines Act*,⁵⁹ which Georgina Williams refers to above, provided one model for the South African apartheid system.⁶⁰ Permits were used to facilitate the 'breeding out' of the 'Aboriginal race',⁶¹ the exemption system was designed to assimilate Nungas into white Australia, separating us from families and communities. The movement of a Nunga away from a detention centre was permitted in accordance with the consideration of a quantum of 'white' and 'black' blood, and 'perceived intelligence'. The certificate of exemption under the provisions of the South Australian *Aborigines Act 1934-39* was in part worded as follows:

Aboriginal Death in custody of Malcolm Smith, Hal Wooten, refers to the assimilation policy as being responsible for the death of Malcolm Smith and refers to the policy as being genocidal.

⁵⁸ Rowley, C.D, 1972:399, also cited in Cunneen, C, Libesman, T, 1995:35.

⁵⁹ *Aborigines Act Amendment, Act 1939*, (SA) section 11a, exempted Nungas from the provision of the Act.

⁶⁰ Australia differed from Africa, in that we were to be absorbed into the white community, not as in Africa separated from it. If we were of the same population density as Africans the apartheid policies would have also been the same. In Queensland and Western Australia, where there were high Nunga populations colonists were fearful of blacks outnumbering the whites. These fears led to the exclusion of Nungas from voting in 1902. For a further reference see, Chesterman and Galligan 1997:13.

⁶¹ *Aborigines Act Amendment, Act, SA, 1939*, section 11a, enabled indigenous people to become exempted from the provision of the Act.

..by reason of his character and standard of intelligence and development, should, subject as hereinafter provided, be exempted from the provisions of the *Aborigines Act, 1934-1939*, does hereby declare that, during the time this declaration remains in force, the said..... shall cease to be an aborigine for the purpose of the said Act.⁶²

Exemption from the provisions of the *Aborigines Act* did not imply a recognition of rights or freedom from the Act; the Aborigines Protection Board could revoke the exemption at any time. Certificates of exemption were issued by the Protector without notice being given to individuals and without their consent.⁶³ Exemption procedures were also used as a punitive measure, to expel people from reserves and restrict contact with family. The following letter to a Nunga from the secretary of the Aborigines Protection Board reveals how exemptions were used to facilitate assimilation and dispossession:

I have to advise that you have been expelled from all Aboriginal Institutions and Reserves in South Australia, consequently you will not be permitted to live at Point McLeay or any other Reserve for Aborigines. Moreover the Board will probably exempt you and your Wife from the provisions of the Aborigines Act. If this course is adopted you will not be permitted to live with or have any relations with the Aborigines of South Australia. My advice to

⁶² *Aborigines Act 1934-39* (SA) section 11a, exemption from the provisions of the Aborigines Act. For a further discussion on the history of the exemption system in SA, see Mattingly, C, and Hampton, K, 1988:49, for stories told by Nungas of their experiences of the exemption system.

⁶³ In my own oral history family members have told stories of exemption certificates being delivered to them without their prior notice. I have heard stories of them returning the exemption certificate, stating they had no need for it, as it only allowed them to drink in public, and as they were not drinkers it was of no benefit.

you is to make your home in Victoria and make the best of the situation in which you have placed yourself by your past misconduct.⁶⁴

Exemptions were promoted by the colonisers as extending citizen rights; they argued Nungas would be offered freedom from the Act and access to government benefits, and the right to consume alcohol.⁶⁵ However the exemption permits were also used as a punitive measure to expel Nungas from reserves and once expelled, restrict further contact with family. Families or individuals wanting to return home to the mission were forced to apply for a permit. Frequently these requests were refused. The process was effective in dismantling the Nunga relationship to ruwe and kin.

The exemption permit in Australia had the same objective as the permit system carried by black South Africans. Both regimes aimed to maintain a white supremacist culture. But in Australia the practice of it was different from the South African system. The South African government maintained a white supremacist regime through the separation of black and white. The Australian assimilation policy maintained white supremacy through the absorption of black into white, and in Canada the policy of assimilation was applied with the same genocidal intent:

⁶⁴ Cited in Mattingly and Hampton 1988:48.

⁶⁵ Nungas who were exempted were entitled to the Commonwealth Maternity Allowance, and Child Endowment payments, and Invalid Old Age pension. But these entitlements were only paid to those who continued to live away from the reserves and lived a European life-style. This was a result of a 1942 Federal Cabinet decision which narrowed entitlement to only those holding a State Exemption Certificate. The *Social Services Act 1959 (Cth)* made entitlement to benefits to all Aborigines except nomadic full-bloods.

I want to get rid of the Indian problems. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question.⁶⁶

Whilst some of the states' *Aborigines Acts* were repealed in the 1960s,⁶⁷ the impact of these oppressive laws still persists in our communities today while assimilation is no longer public policy it still functions in the form of main-streaming. That is where Nungas are absorbed into mainstream Australian society and culture because there is no other choice for those who have no land base, language, or culture, which have already been stripped from us. Nunga initiatives were developed to assist our people who were struggling against the genocide of living on the edge of the mainstream. In the early 1970s these initiatives were based on the principles of self-determination, and many of these initiatives were funded by the federal government. However the federal government has also used these funding relationships for its own public relations objectives, to dispel the growing international scrutiny of Australia as a white supremacist state. Many of these early initiatives are now being dismantled. In 1989, as a result of the establishment of ATSIC, almost the entire federal government budget allocated to Aboriginal Affairs was shifted from the Department of Aboriginal Affairs to the new ATSIC statutory body.⁶⁸ Nunga communities are dependent upon government funding to supply basic health, and housing service, and this funding base

⁶⁶ Cited in Venne, Sharon and Sasakamoose, Eileen, 1994:11, taken from a quote by Duncan Campbell Scott, Deputy Superintendent of Indian Affairs, 1913-1932 made in the film *Time Immemorial*.

⁶⁷ In SA the *Aborigines Acts* were repealed in the 1960's however in Queensland the Acts were still law in the 1970's.

⁶⁸ Budgetary allocations to the Institute of Aboriginal Studies, an organisation established to gather information for the federal government on Nunga communities throughout Australia, were guaranteed direct grants from the federal government. This organisation was spared the humiliation of fighting for the crumbs at ATSIC commissioner or regional council meetings. Its future as a gatherer of information on indigenous peoples was guaranteed. The same funding arrangements were also made

is being eroded and current trends indicate the body is likely to be dismantled by the federal government.⁶⁹ Nungas would then be reliant on mainstream services, where they are able to access them. Many remote communities will remain remote and isolated from essential services, most importantly health services. Some Nunga communities have been coerced into native title agreements simply to fund what most Australians take for granted as basic human rights: health care, housing, education.⁷⁰

While the *Aboriginal Affairs Act 1962*⁷¹ repealed most of the provisions of the *Aborigines Act*, it remained assimilationist in its intent and purposes. When the Bill was introduced, the Minister of Works G. Pearson made the following comment:

..the Bill abolishes all restriction and restraints on Aboriginals as citizens, except for some primitive full-blood people in certain areas to be defined.⁷²

The definition of Aborigines was altered and the distinction made between an 'Aboriginal' who was defined as a 'full-blood descendant of the original inhabitants of Australia', and a 'person of Aboriginal blood', defined as someone of less than 'full-blood'. Under the Act a definition was still required because aspects of the Act applied differently to 'Aboriginals' and 'persons of Aboriginal blood'. The new Aboriginal Affairs Board, (a change of name from the Aborigines Protection Board) was required to keep a Register of Aborigines, Aborigines being full-bloods. The Board was delegated to: 'remove the names of those persons who, in its opinion, are

for the Imparja television network. Imparja has an important function to fulfil for the federal government in the communication of government propaganda.

⁶⁹ *Canberra Times* reports further attempts to gut ATSIC, 29.1.99.

⁷⁰ These agreements for example have been negotiated in remote locations. One example: is Katherine in the NT, the community negotiated for the use of a kidney dialysis machine.

⁷¹ Its full title being *An Act to repeal the Aborigines Act, 1934-39, and to promote the welfare and advancement of Aborigines and of persons of Aboriginal blood in South Australia and for other purposes.*

capable of accepting the full responsibilities of citizenship'. Foster argues that the exemption system still had a function, only now it was more narrowly focussed on 'full-bloods'.⁷³

5.6 Forced removal of children and the destruction of the national pattern of the oppressed group

The removal of Nunga children from their families and their detention in state institutions, was a genocidal act deemed 'lawful' by the recent High Court decision in *Kruger*.⁷⁴ The forcible removal of children from one group to another is a crime of genocide.⁷⁵ The removal of very young children and infants from their families, traditional lands, culture and language severed relationships. The intention was to destroy the family and the individual's nation. The following quote taken from a Protector in WA expresses the intention that lay behind a policy that was implemented throughout Australia:

In Western Australia we have the power under the Act to take any child from its mother at any stage of its life, no matter whether the mother is legally married or not. It is, however, our intention to establish sufficient settlements to undertake the training and education of these children so that they may become absorbed into the general community.⁷⁶

⁷² *Report of the Aborigines Protection Board*, 1962:3, cited in R Foster 1997:46.

⁷³ *Ibid*, See *Aboriginal Affairs Act, 1962, (SA)* section 17.

⁷⁴ *Kurger & Ors v the Commonwealth of Australia*, 1997 146 ALR 126. This decision fortunately is not without its critics, see Kerruish 1998:65.

⁷⁵ *International Convention on the Prevention and Punishment of the Crime of Genocide*, Article 11, i.

⁷⁶ Quote from Neville, Aboriginal Protector, taken from the Commonwealth conference of 1937. He was an Administrator working in WA during the 1930s cited in Beresford and Omaji, 1998:48-49. See

Individuals were absorbed and assimilated into the dominant culture, and many were never seen by their mothers or nations again. Those who made it home, returned scarred and damaged from their experiences of institutionalisation in state children's homes and placements with foster families. The forced removal of children from their families continued into the 1960's. The following quote is a small extract of the story of Wadjularbinna, stolen as a young child from her people at Doomadgee in the Gulf country:

I think it was in the late 1930s that I was taken in. You went to school, you got educated, children played around in the play-ground sometimes when they weren't working, but because I was half-caste and I had white blood in me I worked in the hospital. I did it in play hours, and then the bell would go for school and I'd have to run and get ready for school. So I didn't have a normal play around in the playground.

I worked in the hospital and I worked in the office and in the superintendent's place as a cook; a slave, you know. You put the missionaries' shoes at their feet when they're ready to put their feet in them. You carried bath-water for them up and down a flight of stairs – hot water out of the boiler – and you had to touch it to see if it was warm, right temperature, and then they got into it and if it was too hot you got clipped over the ears.

We were very hungry, too, in lots of ways and because I was skinny and tiny out of the bunch of girls I'd go in, crawl under the fence into the missionaries' yard before I even went to work – I was still a little kid – and I used to go into

the slop tin...to see if there was any food if there was any food for all the kids as they were lined up outside; I'd have to sneak in, they'd have to lift up the fence to let me in because I was the smallest in the bunch. The missionaries had their left-over foods – apple and orange peel – all in a tin that was just under the kitchen window...for the pigs...and I'd crawl in under the fence and go and get it and bring it back.⁷⁷

Once placed in the state institutions Nunga children at the best survived an alien environment, one which was detached from all aspects of Aboriginal culture and heritage. Children were trained in western traditions to perform as a cheap labour force for the colonising culture. At its worst, the children were fed starvation rations, while being physically and sexually abused. It is difficult to understand the thinking behind the High Court in *Kruger*; the cruel and forcible removal of young babies and children from their homes was interpreted as a benevolent welfare policy, deemed to be 'in the best interests of the child'. Kerruish however characterised the decision in *Kruger* as 'perplexing' and 'wrong'.⁷⁸

In *Kruger* five Aboriginal plaintiffs were as children forcibly removed from their communities in the Northern Territory, and the sixth plaintiff, had had her child taken from her. The plaintiffs sought a declaration that the *Aboriginals Ordinance 1918 (NT)*, authorising the removal of children, was constitutionally invalid, and that damages be awarded for false imprisonment and deprivation of liberty. The following

Jeannine, 1996:47-49.

⁷⁷ Wadjularbinna, 1993:142-143.

⁷⁸ Kerruish, V, 1998:66.

provisions of the *Aboriginals Ordinance 1918 (NT)* were considered by the High Court:

s6 (1) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody.

(2) Any person on whose premises any aboriginal or half-caste is, shall, on demand by the Chief Protector, or by any one acting on behalf of the Chief Protector on production of his authority, facilitate by all reasonable means in his power the taking into custody of the aboriginal or half-caste.

s7.(1) The Chief Protector shall be the legal guardian of every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living, until the child attains the age of eighteen years, except while the child is a State child within the meaning of the Act of the State of South Australia in force in the Northern Territory entitled *The State Children Act 1895*, or any Act of that State or Ordinance amending or substituted for that Act.⁷⁹

⁷⁹ The Chief Protector and Protectors of Aboriginals were appointed under the Ordinance. After an amendment of the Ordinance in 1939 the Director of Native Affairs became the successor in function to the Chief Protector. In 1953, section 7 was amended to read: 'The Director is the legal guardian of all aboriginals'.

(2) Every Protector shall, within his district, be the local guardian of every such child within his district, and as such shall have and may exercise such powers and duties as are prescribed.

s16 (1) The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein.

(2) Any aboriginal or half-caste who refuses to be removed or kept within the boundaries of any reserve or aboriginal institution when ordered by the Chief Protector, or resists removal, or who refuses to remain within or attempts to depart from any reserve or aboriginal institution to which he has been so removed, or within which he is being kept, shall be guilty of an offence against this Ordinance.

The High Court majority decision endorsed the constitutional validity of the Ordinance. Gaudron J in a dissenting judgement found the Ordinance invalid because it breached constitutional provisions, protecting free movement and association. The other dissenting judgement of Toohey J found the Ordinance invalid, for breaching constitutional rights to equal treatment. The plaintiffs' claim of genocide was unsupported by all of the judges. The following are the comments by Dawson J on the issue of genocide:

The first thing that may be said is there is nothing in the *1918 Ordinance*, even if the acts authorised by it otherwise fell within the definition of genocide, which authorises acts committed with intent to destroy in whole or in part any Aboriginal group. On the contrary, as has already been observed, the powers conferred by the *1918 Ordinance* were required to be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population generally. The acts authorised do not, therefore, fall within the definition of genocide in the Genocide Convention.⁸⁰

The Ordinance in describing the removal of Nunga children as being ‘in the best interests’ was the basis for the High Court’s unanimous decision that the forced removal of Nunga children were not crimes of genocide. However on the issue of the intent to commit genocide Kerruish argues:

The authorisation of acts defined in terms of a specific intent introduces a discursive element of purpose that is not satisfied by inferring the intent from the effect of the Ordinance. It would have to be shown that in conferring removal powers on an official, the legislature sanctioned their genocidal exercise in the sense of including such an exercise within the range of permitted actions.⁸¹

The High Court decided not to decide the question of genocide and decided that the constitutional law issue of whether or not the ordinance was within the power of the

⁸⁰ *Kurger & Ors v the Commonwealth of Australia*, 1997 146 ALR 126:

⁸¹ Kerruish, V, 1998:69.

legislature to authorise genocide was 'unnecessary to consider'.⁸² What are we to conclude from *Kruger*? Is Parliament allowed to commission the crimes of genocide? Kerruish argues there is no clear answer, and the matter remains dangerously undecided as to what the law says about genocide:

On the question of the constitutionality in Australia of genocide, the High Court's judgements, taken together, cover the field of logical possibilities (true, false and undecided). That is to say, if the relationship between genocide and constitutionality is expressed as the proposition that the Commonwealth parliament has the power to authorise genocide, this proposition has been said by one judge to be true, by another judge to be false and by the remaining four judges to be undecided.⁸³

5.7 Cultural genocide the destruction of the national pattern of the oppressed group

The land is our mother, and ruwe is the core of our culture and traditions. Our forced removal from the land was an act of cultural genocide. Our separation from ruwe was to remove our cultural foundation. The stripping from us of our culture and traditions and the imposition upon us of an alien language and culture, are acts which lead to the destruction of tradition and culture.

⁸² Cited in Kerruish, V, 1998:69 a reference to Brennan CJ in *Kurjer & Ors v the Commonwealth of Australia*, 1997 146 ALR 126:138.

⁸³ Kerruish, V, 1998:79.

Cobo in his report to the UN argues that where states discriminate deliberately against people for their refusal to abandon their culture, customs and traditions they could be deemed cases of 'ethnocide' or 'cultural genocide'. Cobo sees genocide as being a crime against the rights and dignity of a people. "It is a people's cultural heritage that is the expression of that people and that is the true bond of the people's unity." To destroy our culture is to destroy our future as a culturally distinct people.⁸⁴

The destruction of the natural world impacts upon our life in a way that is beyond the understanding of most white people who fail to understand that the ripping and tearing of the body of the ruwe is as though it were attempting to murder our mother. The processes of colonialism have conditioned our response, many no longer express their feelings in the traditional way; their feelings now instead lay buried in prisons, in altered mind states, or simply simmering in deep trauma and depression:

In the early 1960's, I saw bulldozers rip through our Gumatj country in north-east Arnhem Land. I watched my father stand in front of them to stop them clearing sacred trees and saw him chase away the drivers with an axe. I watched him cry when our sacred water hole was bulldozed. It was one of our Dreamings and a source of our water.⁸⁵

⁸⁴ Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres, United Nations publication, Sales No 71.X1V.2. paras. 450, and cited in the Cobo Report E/CN.4/Sub.2/1983/21/Add.3 17 June 1983:14, 16.

⁸⁵ Yunupingu, G, 1997:2.

When our ruwe is damaged it is reflected in our cultural integrity as peoples. The destruction of the places of Tjirbruki for example is reflected in the ongoing struggle of the Karuna people against the looming genocide. The destruction of the land and the natural environment is:

tantamount to ecocide which, with the consequent ethnocide, may ultimately result in a form of genocide. Preventing a group from preserving its traditional forms of life and bringing about the destruction of its culture based on those forms of life and the disappearance of the group as such, are serious violations of the basic rights and fundamental freedoms of the populations in question.⁸⁶

Other forms of cultural genocide are found in the efforts of the coloniser to destroy our languages. In the 1970's the identity and languages of my people was being buried, in the same way that the sacred burial grounds of my ancestors were disappearing under the local council rubbish dump. We were beginning to forget who we were; our languages were no longer spoken. Hundreds of different languages were spoken in Australia when Cook invaded our shores. Throughout our colonial history the state has deliberately implemented policies to suppress the speaking of traditional languages. The old people were punished and the children removed to live in the spoken word of english. The killing of our languages is 'linguistic genocide'. Our languages are disappearing at the rate of one and half per year; only 20 languages are still being passed on to children as the first language of a community, spoken by approximately 10 per cent of all Nungas.⁸⁷

When the United Nations did preparatory work for what later became the *International Convention for the Prevention and Punishment of the Crime of Genocide*, linguistic and cultural genocide were discussed alongside physical genocide, and were both seen as serious crimes against humanity. However, when the Convention was voted on Article 3, which covered linguistic genocide, was excluded from the *Convention of 1948*. However what remains from that process is a definition of linguistic genocide: “prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group”.⁸⁶ The prohibition of our speaking language was endemic, in the colonial history of this country. In the contemporary context support for language programs or court translation services is scarce. Frequently Nungas will appear in court, and have a matter finalised without the assistance of a translator. And during 1998 the Northern Territory government which is responsible for a region where the greatest percentage of Nunga languages is spoken as a first language in this country, made a decision to phase out financial support for bi-lingual education in Aboriginal schools.⁸⁹

The behaviour which constitutes the crime of genocide, is the systematic imposition of conditions of physical or underlying psychological harm upon the targeted group. The intent of the genocidists is to make things so uncomfortable for people that they will ‘voluntarily’ disassociate themselves from the group in order to avoid the consequence of membership, with the intention to bring about group dissolution. One

⁸⁶ Cobo Report E/CN.4/Sub.2/1983/21/Add.3 17 June 1983:17-18

⁸⁷ Lo Bianco, Joseph, 1999:6.

⁸⁸ Tove Skutnabb-Kangas 1996:128, for a discussion on linguistic genocide.

example is the creation of physical conditions of impoverishment or discomfort which causes people to separate themselves from their group and try to become or live like something else, someone else. Another is the destruction of the physical environment in such a way as to remove the basis for continuing viability of the existence of the group.

Our relationship to ruwe is becoming increasingly replaced by a shopping mall existence. To remove people from the ruwe is to inherently precipitate group dissolution. When the ruwe of the grandmothers is drained of its waters, it starts to dry up, and the rushes used for weaving our baskets, the containers of our life, can no longer grow. The animals we are dependent upon for food no longer flourish, and progressive environmental degradation works towards the dissolution of the group. Our continuing viability culturally, socially and economically is linked directly to the land and not some parking lot or shopping mall.

Greta Bird argues that there were three distinct periods of time, from the time of the invasion by Cook. The first being the iconoclastic (or smash and grab), the second the academic, and third the commercial. In each period Bird argues that Nungas have struggled against white interpretations of culture and white control:

Denial and denigration of Koori culture during the 'smash and grab' period provided a basis for legitimating the terra nullius doctrine, and flowing from it, white cultural supremacy at all sites of power. Academic control allowed scholars to define 'real' Aboriginal culture and thereby explain the subordinate

⁸⁹ For the Commonwealth Parliamentary discussion, see, Hansard Report, House of Representatives, 10 December 1998, 39th Parliament, First Session-First Period, pp1402-1404, also cited in Lo Bianco, Joseph 1999:1.

status of Aboriginal people. This scholarship denied Kooris access to their past and to an alternative reading of that past. Today commercial exploitation seeks to manipulate Koori artists and land managers to package a marketable culture producing large profits for white entrepreneurs.⁹⁰

It is all three phases that have worked to erode our cultural foundations, and it is the final stage the commodification of our culture that we are currently struggling to survive. Commodification of culture takes the form of cultural tourism and the 'rent a Nunga' phenomena. Against which we resist, in the struggle to stake a cultural terrain for our own family and kin identifications. A territory that is somewhere away from the maddening crowds, flocking for a taste of exotica.

5.8 Kumarangk: a case study in cultural genocide

The state government of South Australia in April of 1993 approved the building of a bridge from mainland Goolwa to Kumarangk (more commonly known as Hindmarsh Island).⁹¹ A group of Ngarrindjeri miminis opposed the building of the bridge on a site where their culture and spirituality would be destroyed if the bridge were built.⁹² The miminis applied to the Commonwealth Minister Tickner in April 1994, for a declaration to prevent the building of the bridge.⁹³ The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), provides protection for a site where

⁹⁰ Bird, G, 1996:105-106.

⁹¹ Named after Governor Hindmarsh, one of the first Governors of South Australia.

⁹² Stevens, I, 1995:287.

established that the threatened site is a significant Aboriginal area, in accordance with Aboriginal tradition.⁹⁴

Prior to making a declaration Minister Tickner appointed Professor Cheryl Saunders to report on the cultural significance of the area. Saunders recommended that the site be protected under the *Aboriginal Heritage Act 1984* (Cth). In the preparation of the report, Dean Fergie⁹⁵ and Saunders were advised by the Ngarrindjeri miminis of the relationship of restricted women's business to the site. An anthropological assessment of the claims of the restricted women's business was described in the Appendix of a submission prepared by Dean Fergie. This report was an Appendix to the final submission prepared by Professor Saunders for Minister Tickner. When the Minister was presented with the Saunders report, the appendices describing the nature of the restricted women's business were contained in a sealed envelope. In consideration for and respect of restricted women's business, (one restriction being that males not have knowledge of this particular aspect of the women's culture and law) Tickner never read the contents of the envelope. Following the advice of Professor Saunders that the site was of significance to the Ngarrindjeri miminis, the Minister for Aboriginal and Torres Strait Islander Affairs Robert Tickner on July 9th 1994 signed a declaration pursuant to section 10 of the *Aboriginal and Torres Strait Islander Protection Act, 1984*. The declaration prevented the construction of a bridge between Kumarangk and the mainland for 25 years.

⁹³ Section 10 application pursuant to the *Aboriginal and Torres Strait Islander Heritage Protection Act*, the Minister has a discretionary power under the Act to make a declaration to protect Aboriginal cultural sites.

⁹⁴ Section 10 (1) (6)

The developers of the residential scheme which was in their view, unviable without the proposed bridge, Binalong Pty Ltd, then applied to the Federal Court for a review of the declaration made by Minister Tickner. In February 1995, in the Federal Court O'Loughlin J quashed the Ministers declaration and held the section 10 (1) (c) requirement of the *Aboriginal Heritage Act* that the Minister consider a report on the site in question had not been complied with. His honour also held that an essential part of the reporting process was flawed because the notice published did not, in several respects, state the purpose of the application, as required by section 10(3)(a)(i). O'Loughlin J held that to state the "purpose of the application" it was necessary to identify in the notice three things: the specific area for which preservation or protection was sought, the apprehended injury or desecration and the identity of the applicant(s).⁹⁶ Minister Tickner then appealed to the Full Court where the court upheld the decision of O'Loughlin J.⁹⁷

Following the federal court decision a fresh application for a declaration was made to the Minister. The Minister then nominated Justice Mathews, a judge of the Federal Court, to prepare a report to the Minister pursuant to the *Aboriginal Heritage Act*. However the validity of this appointment was subsequently challenged in *Wilson v the Minister of Aboriginal and Torres Strait Islander Affairs*.⁹⁸ The court decided that the report of Mathews to the Minister could not be relied upon by the Minister for the purpose of issuing a fresh declaration under the *Aboriginal Heritage Act*.

⁹⁵ Dr. Dean Fergie, a female anthropologist, prepared a report from consultations with the Ngarrindjeri miminis on the cultural significance of the site to the women. The report was prepared for the Aboriginal Legal Rights Movement.

⁹⁶ *Chapman v Tickner* (1995) 55 FCR 316.

⁹⁷ *Tickner v Chapman* (1995) 57 FCR 451.

⁹⁸ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. The state government of South Australia announced their intention to hold a Royal Commission on the same day Federal Minister Tickner announced the Commonwealth governments federal inquiry.

Following these successful applications of the bridge developers, conflict of views held by different Ngarrindjeri grew over the truth or otherwise of restricted women's business, all of which was well reported by the media. Never before had so much media attention been directed at the Ngarrindjeri. A group who were named by the media as the 'dissident women' claimed the 'proponent women' (the supporters of women's business) had fabricated restricted women's business. In a televised interview Doug Milera said restricted women's business was fabricated, by himself and others. Milera's statements, among others, were used by the state government of South Australia to call for a Royal Commission inquiry into whether or not restricted women's business had been fabricated.⁹⁹

A short time after Milera's televised interview, the Government announced they would establish a Royal Commission into Hindmarsh Island. The Commission was established on the 16th June and set out to discover, in an environment hostile to Aboriginal laws and culture, the 'truth' of whether restricted women's business or what the Commission constructed as 'secret sacred women's business, was real or not. The inquiry was established in haste to hear evidence over a brief period of time, before it was due to finally report to the state by the end of September. The Commission was established while Minister Tickner was awaiting an appeal decision to the Federal Court.¹⁰⁰ At the time the State Government established the inquiry they already had notice of the Commonwealth government's intention to establish its own

⁹⁹ Phillip Clarke, an 'expert' witness, gave evidence to the Inquiry that what the Ngarrindjeri women called restricted women's business, but what the Commission constructed as secret sacred women's business was fabricated. Clarke defines 'women's business' as any business which women would conduct as women separate from men, or perhaps more precisely, any business that they predominantly do separate from men, which would take in avoidance as well as, in the broadest sense of the word, secret sacred business, Transcript p3554-3555. He goes on to define 'secret sacred women's business, as secret sacred business that only women know and are responsible for. He and others refute the claim of the proponent women that secret sacred business ever existed.

inquiry, by Mathews J to consider whether the Minister should vary or revoke the existing declaration or make a new declaration. Nonetheless the State moved to hold its own inquiry.

The Commonwealth government challenged the establishment of the Royal Commission inquiry, arguing that the inquiry lay within the Commonwealth's exclusive jurisdiction.¹⁰¹ In response counsel assisting the Royal Commission submitted:

This inquiry will not be investigating the report of Professor Cheryl Saunders of July 1994 obtained by the Federal Minister pursuant to s.10(4) of the *Aboriginal and Torres Strait Islanders Act, 1984*. The Commission has no interest and ought to have no interest in looking at what Professor Cheryl Saunders should or should not have done, or otherwise, as to the conclusion reached in her report. Indeed, to do so would be contrary to clause 3(a) and perhaps unconstitutional. However, this commission is entitled and must inquire in to the subject matter which constitutes the surrounding circumstances of Professor Saunder's report.¹⁰²

Those surrounding circumstances the Commission spoke of were the spiritual beliefs of the Ngarrindjeri miminis. This was an inquiry by the colonial state into the people it had subjugated and held power over since 1836. This people had no power to speak or name our identity, because that was a power the colonial state had assumed and held from the point of their invasion. The inquiry was a first; never before had an

¹⁰⁰ The Federal court appeal is mentioned above, *Tickner v Chapman 1995*, the appeal failed.

¹⁰¹ Submission made by Griffith, Counsel for the Commonwealth, Royal Commission into Hindmarsh Island, Transcript p 15.

Australian government held an investigation into the religious and spiritual beliefs of a people. The process was a violation of Aboriginal laws and culture. It was an attempt to translate and understand the nature of our laws and culture within an alien, oppressive, and hostile environment. The State patronised us by trying to dress the court in a respect for Aboriginal traditions; the following attempt at Nunga protocol was made by Counsel Assisting the Commission Mr Smith, in his opening statement:

As a preliminary matter, on behalf of the Commission, I acknowledge that this inquiry, which relates to the Ngarrindjeri people, is being held on Kaurna lands, and this inquiry acknowledges the fact of that in the presence of an Elder of the Kaurna people, Mr. Lewis O'Brien.¹⁰³

Was the above acknowledgment an attempt to give the inquiry a legitimacy, through the acceptance of a member of the traditional community upon whose ruwe the inquiry was held? No such acknowledgment had ever been expressed by a Royal Commission inquiry before. Were they subconsciously questioning their own legitimacy? Or was the embracing of an Aboriginal welcoming ceremony a muldarbi attempt to accommodate culture and law, but which was really establishing a process that would demean culture and law?

The Royal Commission into Hindmarsh Island was established to investigate whether 'secret sacred women's business was fabricated.'¹⁰⁴ The Ngarrindjeri women asserting the truth of women's business made the following application to the inquiry,

¹⁰² Royal Commission into Hindmarsh Island, Transcript p51.

¹⁰³ Ibid:80

¹⁰⁴ Stevens Iris, Royal Commissioner 1995 was appointed by the State of South Australia. The term 'secret sacred women's business' was constructed by the Royal Commission inquiry. The Ngarrindjeri miminis had used the term 'restricted women's business'.

through their counsel Claire O'Connor. They stated that they would not seek representation before the Royal Commission, because they did not recognise the authority of the Commission to discuss matters on Aboriginal culture and law.

Counsel read their statement to the Commission:

Ms O'Connor:

We, as Ngarrindjeri women believe the women's business, the subject of the Royal Commission into Hindmarsh Island, is true. We are deeply offended that a Government in this day and age has the audacity to order an inquiry into our secret, sacred, spiritual beliefs. Never before have any group of people had their spiritual beliefs scrutinised in this way. Under Aboriginal law women cannot speak about women's business where there are men concerned. Our law for Aboriginal women prohibits us from talking about this business, not only to any men, but also to those not privileged to be given that information. It is our responsibility as custodians of this knowledge to protect it. Not only from the men, but also from those not entitled to this knowledge. We have a duty to keep Aboriginal law in this country. Women's business does exist, has existed since time immemorial and will continue to exist where there are Aboriginal women who are able to continue to practice their culture. ...We do not seek to be represented at this Royal Commission. We do not recognise the authority of this Royal Commission to debate and ultimately to conclude that women's business relating to Hindmarsh Island exists. We know women's business exists and it true.We do not recognise you, Madam Commissioner, as a custodian of law in our society. We shall continue to practice our customs and law according to our customs and law as

Aboriginal people have since time began and especially since the invasion. ...Our only motivation for protecting our stories is our responsibility to the land and surrounding waters and to our people. ...We refuse outright to recognise your Commission as having any right to decide whether we have fabricated anything, when we know that we have not. ..In addition to that, the women come today with two items they wish to show you, traditional items. One is a women's law ceremonial stick and one is a painting.

Comsr.

You will recognise that I have shown a great deal of latitude as far as your statement is concerned. After all, this is an inquiry. However, there must be some limits. What is it that you wish me to do?

Ms O'Connor:

The women have come here today with two traditional items important to the knowledge that this inquiry is about. One is a painting.

Comsr:

You wish to tender them?

Ms O'Connor:

No, they simply wish to show them to your Honour. One is a painting and one is a ceremonial – a women's law ceremony stick which is about women's law and which they wish to show to your Honour. They are secret women's business items and they would like to show them to your Honour if all the men would vacate the room.

Comsr:

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

Ms O'Connor:

At this stage, I am simply instructed that the women do not seek to be represented before this Commission.¹⁰⁵

The process of explaining our truth is different from the way evidence is taken in a western legal context. Evidence of our laws and culture is in the way we live, in the thoughts and dreams we keep secret, and the songs that linger at the edge of our memories. 'The evidence is in the sayings of my people'.¹⁰⁶ The evidence is in the songs. The attack on Indigenous ways of knowing is a universal practice. For example one non-indigenous 'expert' on the history of Hawaii argued that there was no real evidence of Hawaiian opposition to the annexation of Hawaii by the US. Trask simply argued the evidence is in our lament and the wailing.¹⁰⁷

At the opening of the Royal Commission inquiry, it was made clear by Counsel for the Commonwealth that the Commission could not compel Nungas to disclose secret spiritual beliefs in ways that would infringe the *Racial Discrimination Act 1975* (Cth)

¹⁰⁵ Royal Commission into Hindmarsh Island. Transcript, pp19-22.

¹⁰⁶ Trask, H, 1993:151, and see Stacy, H, 1996:291.

¹⁰⁷ Trask, H, 1993:155.

by limiting or impairing the enjoyment of human rights.¹⁰⁸ While the inquiry did not force by way of subpoena the proponent women to give evidence, it did very little to provide a 'safe' environment for the women to tell their stories.¹⁰⁹ The inquiry continued with uninitiated men and women with no knowledge of women's business engaged in the task of finding its truth.¹¹⁰ The nature of restricted women's business was revealed by Doreen Kartinyeri to Dr. Fergie and then later to Professor Cheryl Saunders. This knowledge was revealed on the condition that it be protected, from males or un-initiated women. To comply with Kartinyeri Saunders sealed in an envelope the record of the restricted women's business. Counsel for the dissident women pushed to have the contents made public to the inquiry:

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

¹⁰⁸ Royal Commission into Hindmarsh Island Transcript, p17.

¹⁰⁹ Ibid: 237-238, the Commissioner reveals her lack of understanding of our culture and laws and the conflict which arose between the conflicting groups of miminis. The Commission inquiry fuelled the fires of conflict, creating further divisions amongst the communities. Ironically one of the expressed intentions of the inquiry was to diffuse the conflict in the community.

¹¹⁰ Ibid:128, counsel for the dissident women Mr Abbot made it clear to the inquiry that the dissident women do not reject women's business, but do reject secret sacred women's business. 'Secret sacred women's business' was the term applied by the Commission; the proponent women had always referred to culture in terms of 'restricted women' business. It is culturally inappropriate to place these issues before a judicial inquiry. This is illustrated by the above counsel; in terms of Aboriginal law a man speaking in this way is offensive and a violation of the law of women.

test the criticisms that are made in respect of the generality to see if they are correct and, if so, what weight you give them.¹¹¹

The factor of secrecy is something that drives those with power nuts. It places knowledge out of their reach. And they have to have it, regardless of the cost to the keepers of it. The west peddles a myth of its own openness and freedom from secrecy, the idea is that all knowledge is freely available. But there are many areas where the cost of knowledge to most people is prohibitive for example; areas of 'expertise' in the legal profession, medical, engineering and computer sciences, are a few examples.

In contrast Nungas have a system where the law is layered, parts are for public knowledge and other parts are veiled in secrecy. Nonie Sharp has written about the issue of secrecy for the Meriam people. She points out that writing down the law has the potential of becoming a muldarbi. And as Sharp argues, 'the old secret ways which convey a sense of mystery and danger in wrongdoing are coming to be supplanted by public by-laws':

The court case has contributed towards a strengthening of Meriam culture by making explicit Meriam custom, law and meaning systems. It has also created new paradoxes. In the new circumstances of recognition of native title at the Murray Islands, the laws of Malo, a subject of public reflection and private introspection, are being incorporated into the Mer Island by-laws. As we have seen, Malo's Law exists in various versions, a result of the flexibility of the oral tradition. However the past generations saw it, contemporary Meriam

¹¹¹ Ibid:127-128.

Law in written form transforms and reifies Meriam society into bounded categories, inhibiting the creativity and flexibility which are the hallmarks of the oral tradition.¹¹²

The Kumarangk inquiry relied on 'expert' anthropological evidence taken before the Commission and also the text *A World that Was* by the Berndts, an anthropological text which was elevated to being almost the last word on 'authentic' Ngarrindjeri culture by the inquiry. Tonkinson also an anthropologist wrote the following forward to the text:

Certainly, no evidence exists that there was any issue of secret-sacred versus public-sacred or non-sacred material that could conceivably have divided senior Yaraldi people in terms of whether or not to divulge such information to outsiders. All the material gathered by the Berndts, including that pertaining to sorcery, beliefs and practices, was freely available and public, just as it had been traditionally, according to the Berndts' Yaraldi teachers.¹¹³

However Tonkinson's comment is qualified by an earlier one which he made, and reveals some of the issues that arise out of the use of anthropology as a way of knowing us:

As to the important question of how accurate a picture of Yaraldi society and culture this study provides, the Berndts hasten to point out that it is built up principally from the 'memories of fallible people' - and a very small number at that. It has been shaped, too by the biases of the authors; their interests at the

¹¹² Sharp, Nonie, 1996:170.

time, the kinds of questions they asked, their selectivity in recording information, and so on.They concede that there are gaps in certain aspects of the material gathered and, in their concluding comments, they emphasize that they 'in no way' exhausted the extensive repertoire of cultural knowledge held by the Yaraldi people with whom they worked.¹¹⁴

Anthropology is used to construct our identities, - Ngarrindjeri, Yaraldi, Tanganekald and others, - and though Tonkinson argued that there was no evidence of the Yaraldi people having divisions between sacred and public knowledge, he admits to there being gaps in cultural knowledge. Yet the work by the Berndts was used as one of the sources in supporting the assertion that sacred women's business was a fabrication. The text was held as the 'bible' on the culture and tradition of the Yaraldi people whose culture and laws was the centre of this inquiry.

The established anthropological orthodoxy constructed from the ethnographic literature of last century was that Nunga miminis were excluded from any role other than child rearing and the gathering of foods. Anthropology mirrored back its own idea of women, one that was subjugated to a male gerontocracy.¹¹⁵ Women were invisible in the world of early anthropologists. Their imaging of us was more a reflection of their own sufferings and sense of superiority, we were represented as the whore – slut, the ever-ready available fuck. We were the disposable commodity,

¹¹³ Tonkinson in, Berndt R and Berndt K, 1994:xx1, much of the information recorded by the Berndts was from informants that were telling of a time of the grandfathers and grandmothers not unlike what Kartinyeri has done in reference to Kumarangk, and yet one is credible, the other is discredited.

¹¹⁴ Berndt and Berndt 1995:x1x,

¹¹⁵ Langton, M, 1997:84 for further discussion on the exclusion of Aboriginal women by early anthropology, from having any important place within Nunga society.

ranking lower than the pet dog, in their classificatory system.¹¹⁶ The final outcome of the inquiry was perhaps decided before it commenced. In consideration of our history and continuing relationship to the colonial state it was not surprising that the inquiry held a spotlight to the cultural and spiritual beliefs of Nunga miminis, and our culture was so demeaned that the destructive impact on the cultural integrity of the group will be felt by the community for some time to come.

The following evidence of the 'expert' Clarke whose academic background is based more in history than in anthropology, illustrates the power he has given to the views of the missionary Taplin who controlled Raukken during the 1850s-1880s, and the views of linguists over those held by Kartinyeri:

..the point is that she (Doreen Kartinyeri), saw a relationship between a word that she knew as a Ngarrindjeri word for 'pregnant' and Taplin's word for 'Hindmarsh Island'. I cautioned her from making a hasty conclusion about that by saying that, you know from my experience, only a linguist could tell whether there was likely to be any relationship between the two words.¹¹⁷

The above view, a view which excludes Aboriginal ways of knowing, and the knowledge that is still carried by the contemporary custodians, is enshrined by the inquiry. Kumarangk in our language means the points, and kummari meant to

¹¹⁶ See Pettman, J, 1992:24-25, for further discussion on the colonial image of Nunga miminis.

¹¹⁷ Stevens, Iris, Royal Commissioner Report, refers to the evidence of Phillip Clarke, 1995:112, and the *Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Ors (1998)*. Olney J relied on the writings of Curr an early colonist, when he decided the members of the Yorta Yorta community were not able to establish a connection to the claimed lands under the *Native Title Act 1993*. Olney J, similar to the reasoning of Commissioner Stevens, refutes the evidence of anthropologist Deborah Bird Rose. Olney J dismisses her expert evidence because, as he claims, she had relied too much on the statements of the applicants and not enough on the writings of earlier colonists, to prove the genealogical connection to ancestors who lived in the claimed areas prior to the 1788 invasion.

become pregnant. The position of the 'expert' devalues Aboriginal knowledge, effectively dispossessing us from naming who we are, and relegating our thoughts and expression of culture to a place of terra nullius. The 'experts' dispossess us from being in our identity, and begin to mark points in time where they determine tradition and culture as beginning and ending. Nungas have never said our culture and traditions have ended or that we have stopped thinking as Nungas. The white supremacist attitudes of the coloniser attempt to permeate all levels of our thoughts in their efforts to become the managers of our memory culture, languages and law ways.

In his evidence Clarke discusses the role of oral history, contrasting it to the superior position of the 'expert' and the written word:

...there is a real problem with putting forward oral history as something that is a valid alternative to academic history. But, I mean, oral history in the way that I have used in my thesis is a cultural artefact in itself and worthy of study and it does tell a lot about the speakers of that oral history. But, as a narrative in its own right which informs people about the past, it cannot be taken as a replacement to Aboriginal history.¹¹⁸

I found this to be a very interesting comment, as he says oral history tells us about the speaker so anthropology is telling us much about the observer and the recorder. Both speaker and recorder are telling a story. The difference is that the oral history is a telling of the history of the teller, but the outsider is telling or recording a history that is not his history story but one he tells from his field of vision, and in a sense it really remains the recorder's story. These are ideas that Clarke seems to have not yet

thought through, or if he has, he denies or rejects them. Clarke is not alone with his view on the importance of recorded history. Olney J in the Yorta Yorta Native Title application to the Federal Court expressed similar views to those of Clarke and Phillip Jones¹¹⁹:

The most credible source of information concerning the traditional laws and customs of the area from which Edward Walker's and Kitty Atkinson Cooper's early forebears came is to be found in Curr's writings. He at least observed an Aboriginal society that had not yet disintegrated and he obviously established a degree of rapport with the Aboriginals with whom he came into contact. His record of his own observations should be accorded considerable weight. The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than to the information recorded by Curr. Much of what subsequent writers have said about early Aboriginal life is necessarily based upon other than original observation and much is mere speculation. Curr himself was not averse to a degree of speculation and to the extent that he indulged in that practice his opinion should not be accorded any weight but his record of his own observations and of what he was told by his Aboriginal informants, must be regarded seriously. As has been done in considering the question of descent from the indigenous inhabitants, it will be

¹¹⁸ Royal Commission into Hindmarsh Island Transcript, p191.

¹¹⁹ Phillip Jones is also presented to the Commission as an 'expert'. Many of the questions and issues which they respond to are constructed in anthropological terms. On the surface it appears that they are the 'expert anthropologist' and yet Jones like Clarke holds a degree majoring in history. An interesting question to ask is why the Commission has constructed their evidence to appear to be that of anthropologists. Their only real claim to anthropology is that they are employees of the SA Museum Anthropology Department. It is interesting that their evidence is taken to outweigh the evidence of the

necessary to draw inferences from known facts concerning traditional laws and customs observed in the 1840s in order to relate back to the time at or prior to the first exercise of British sovereignty.¹²⁰

The writings of Curr over a 100 years ago, were written from a racist, sexist, and colonist perspective, - they were of their time. The writings of Curr were the primary evidence Olney J relied upon when he denied the Yorta Yorta People their native title application. The following reference to Curr by Olney J, is taken as evidence of traditional customs and laws:

It appears that in the Bangerang society the role of women was subservient to men. Curr records that in domestic life man was "despotic in his own mia-mia or hut" (Recollections p 247); that children belonged to the tribe of the husband (p 249); and that prior to the coming of the whites the Bangerang, as a rule, "enforced constancy on the part of their wives, and chastity on their unmarried daughters" (p 249).¹²¹

The above judicial view indicates the problem for native title applicants in having their history, culture and laws interrogated by the judicial processes, and in particular by judicial officers who are backward in their thinking and analysis.

During the Hindmarsh Island hearing much was made of the fact that only one person - that is Kartinyeri, - had the story of restricted women's business. Yet under cross-examination Clarke agreed that the story Thukabi the turtle was a story which was

trained and qualified anthropologist Dr. Dean Fergie. I am grateful for the comments on this point by Dr Fergie.

¹²⁰ *Members of the Yorta Yorta Community v the State of Victoria and Ors (1998)*, Olney J: 106.

held solely by Henry Rankine until a few years ago. Lola and Ron Bonney are also referred to in the transcript as individuals who had knowledge that was not commonly known.¹²² Clarke was also dismissive of evidence of the existence of the Seven Sisters in the Lower Murray region. During examination in chief of Clarke he responded as follows:

Q ...I have heard talk, in the context of this case, about the Seven Stars Dreaming. Does that, in your view, have any relevance to what has developed here in relation to Hindmarsh Island.

A That is a mythology that, on the basis of what I know - and, again, I don't know what the core of the secret sacred women's business is about - but, from my knowledge, that was mythological information that was overlaid, if you like, once the basic secret sacred women's business had been formulated. There are examples, some of them documented, whereby particularly Western Desert people have used their dreamings, and they tend to use more pan-Aboriginal dreamings like the Seven Stars, but used dreamings such as that to extend their sphere of influence. I know, among anthropologists, we often describe the Pitjantjatjara as the imperialists of the Aboriginal world through this very process. So they have been increasing their sphere of influence, and they often do it through these types of issues. So there is some consistency there in terms of recent history. But if we were to go back and look at the cultural blocs, as they referred to in my thesis, and look at the distribution of culture early last century, then it is quite clear that the Western Desert culture had only marginal influence in the sort of Flinders Ranges to Adelaide region, and no influence in terms of language or shared ceremony, or any of those sort

¹²¹ Ibid:114.

of parameters, no influence on the Lower Murray region. So, I suppose - I was going to call it an importation of mythology from the point of view of the Western Desert. It is something that has been going on for presumably hundreds of years, but in relation to Adelaide and the Lower Murray it is very recent, and in relation to Hindmarsh Island, I would say it is just a couple of years.

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

A Yes, you could call it women's business, in terms of how that would be defined in the Western Desert. With all this talk of women's business, no-one has really explained it. But in terms of Aboriginal pidgin/business' refers to just general ritual or ceremony. So that 'women's business' would be ritual or ceremony, not necessarily secret, sacred at all.¹²³

But there are records of the travels of the Seven Sisters¹²⁴ and their presence throughout the greater Australian landscape, including the Lower Murray and the Lakes. Tindale records a reference to the Seven Sisters, and Henry Rankine's mother told the story of the Seven Sisters and their travels in the Lower Murray and lakes region, evidence that stands in opposition to that provided by the 'expert' Clarke. The following is told by Annie Rankine who lived in the Lower Murray region at Pt McLeay. This story that was ignored by the inquiry:

My father used to tell us children of a special group of stars which is called the Seven Sisters, and before they were moving we weren't allowed to swim

¹²² Transcript: 3744-3746.

¹²³ Ibid:205-207.

¹²⁴ Clarke, Phillip, Allan, 1994:123, also refers to the Seven Sisters in his thesis.

because the dandelions were in bloom then, and it was said that when the dandelions are out the water is still chill, and this is why our people are very strict and don't allow us to swim.

When the flowers all died off and the stars moved over a bit further, this is when we were allowed to swim because in that time the dandelion flower which would cause a fever to anyone would not be out to make us sick. So this is how we were taught the old people's way of living.

Many a time I tried to sneak past, go down the lake and get away from my dad, but he would be waiting right on the dot for me, and then one whistle from him; we'd know that straightway we had to run, we knew we were wrong. All this will be in my memories and I'll never forget, because it remains so dear to me, taking notice of my father, being brought up that way; this will ever be in my memories. And that's all I have got to say on the stars.¹²⁵

The following story is told by Veronica Brodie of the Seven Sisters at the Goolwa site:

[Ngarrindjerri's] connection with the Seven Sisters was that he sent a young man, Orion, after the Seven Sisters to chase them and bring them back. They didn't want to be caught so they headed up to the sky, up and up and over the Milky Way and hid and there became the Seven Sisters.

When they want to come back to see their Mum, who is still in the waters - near where the ferry crosses, just a little over towards the mouth, to the south- there has to be a clear way, so they can return and they'll be returning shortly, when it gets cold, that's when they disappear from the sky. Then they come back down and go under the water to be with their mother. Their mother belonged to the Warrior Women of the Island.¹²⁶

Other expert evidence, a statement provided to the inquiry by Steven Hemming,¹²⁷ referred to examples of women's business he had extracted from the literature of the Berndts. The Commission ignored this evidence. It was noted by the Berndts that on a number of occasions Pinkie Mack could not remember songs or particular details when asked for further information by the Berndts. Hemming argued that Pinkie Mack's failed memory was more likely to be her acting in the protection of secret sacred information, but this analysis offered by Hemming was ignored by the Commissioner in her final report. The following quotes submitted to the Commission are taken from the Berndts:

A day or so after the beginning of a girl's first menstruation.. An older woman [probably the putari or healer], using a ngalaih [grasstree] stem dipped in the girl's blood, would tap the muscles below her shoulder blades and then her chest to make her healthy and strong. Songs accompanied this rite which

¹²⁵ Rankine, Annie, 1969.

¹²⁶ Cited in Bell, Diane, 1998:578.

¹²⁷ Hindmarsh Island Bridge Royal Commission, a written Statement of Evidence by Steven John Hemming 28 July 1995.

Pinkie Mack had undergone, but unfortunately she could not remember them.¹²⁸

This [next stage] took place some short time after a girl's first menstruation and the focal point was the manggi, meaning 'marking' rite. A large group of women would accompany the girl into the scrub, where they prepared a cleared space and built fires. Pinkie Mack added that all women of the local camps would go out to make fun at this time. Men and boys were strictly forbidden to come near where the women were camped. The women would sit in a large circle with the novice in the middle and chant special songs referring to the girl's puberty.¹²⁹ (Again, these songs were not remembered.)

Some time after the manggi rituals and after her hymen had been pierced,... she would go out into the bush with some of her female peers and close relatives where they would clear a place and make a fire. Sitting around it, they would sing her breasts to grow large, rounded and heavy, with nipples protruding.¹³⁰ (the songs were not remembered).

Pinkie was a notable singer, or song-woman: not that she usually composed songs herself, but she remembered a great many. (Among the few she could not recall were some of the girl's initiation songs.)¹³¹

¹²⁸ Berndt and Berndt 1993:154, the comments in brackets are those of Hemming in his statement to the Royal Commission.

¹²⁹ As above. The brackets are again those of Hemming from his statement to the Commission.

¹³⁰ As above:156. Comments in brackets are those of Hemming.

¹³¹ Berndt 1989:12. The bracketed comments are those of Hemming.

Experts occupy a place of muldarbi-power, they claim the right to speak. They reside in a zone which is free from interrogation, in their studies of 'us'. Experts are allowed to refer to informants as being, 'regarded by the rest of the community as knowledgeable informants on particular aspects of Ngarrindjeri culture.'¹³² But who is the 'rest' that he refers to? Is this expert so 'inside' the camp that we are to assume he becomes one of us, and yet remains the other, particularly when it comes to speak as the 'expert' about us? Clarke expanded his range of expertise by almost becoming us, the insider:

There is one of several factors that would influence my perception of what is going on. The fact that I personally have access through my marriage to an Aboriginal woman of that group, I have access to an insider's interpretation of that culture is something else that I can take account of. I'm not saying that I incorporate those views as objective anthropological data, but I would incorporate those views as cultural artefacts which are worthy of being part of the raw data that I would utilise to come up with a model of what is happening.¹³³

Under cross examination Clarke was put the possibility that the recording of restricted women's business could have been omitted, and the fact it was not recorded should not invalidate it. In reply Clarke responds:

It wouldn't in a region where there is not much history or anthropology that has been done. In a very heavily worked area like the Lower Murray, I would say that that is extremely unlikely.¹³⁴

¹³² Transcript:154, 123.

¹³³ Clarke in his evidence to the Royal Commission into Hindmarsh Island Transcript at p 321.

¹³⁴ Royal Commission into Hindmarsh Island Transcript p 3702

Where I differ from the other people who support the women's business on Hindmarsh Island is the fact that, whether it was secret sacred women's business – and secret sacred women's business would go against the ethnography from the Lower Murray which affords men's business and women's business on equal footing and, therefore, so much interconnection, that it can't really be separated out.¹³⁵

But how does he so confidently know there are no secret sacred spaces? The expert anthropologist giving evidence to the inquiry set the boundaries of what was beyond the realm of knowing, and secret sacred women's business was sited outside the *krinkiri*¹³⁶ realm of knowing. So of course as a white male he would have no knowledge. But the expert has the power to translate the place he occupies: 'unknowing white male' and impose it as a universal for all. This is *muldarbi* power.

Throughout the inquiry there was little mention of the impact of colonialism, or life in the belly of genocide - *muldarbi*. The experts discussed restricted women's business as though Cook had never invaded our shores. In his evidence Phillip Jones spoke about the barrages that were built in the 1930s and he tried to argue that there was no impact upon our culture as a result of the Goolwa barrages being built, and neither was there any resistance to the barrages being built:

A Now, what the barrages effectively did is prevent the mixing of fresh and salt water. So, at a time in the 1930s I would suggest that the effect of the barrages was, in traditional terms, if we look back and say that that event maybe had

occurred several hundred years ago, somehow, that I would suggest that that would have had quite cataclysmic effects on the culture. At least effects which would have had to have been accommodated in some fairly radical ways.

Q And yet the barrages didn't have that effect so far as the literature-

A We don't know of it. The claim has been made that Aboriginal people were disempowered from making their opinions felt, at that time. But I would find that difficult to suggest - a difficult conclusion to draw, because of the very close contact that several anthropologists had with Ngarrindjeri people, at that time.¹³⁷

In the 1930's Nungas were being rounded up and living under the total control of the *Aborigines Act*; it was a struggle to survive and keep families together, let alone prevent the destruction of ruwe. Many Aboriginal people over the years have spoken of their great sadness over the building of the barrages, however this evidence did not come before the inquiry.¹³⁸ The old people in my life have also expressed great sadness over the building of drains into the South East and the damage done to the ruwe. And as to the idea of anthropologists being around at the time to record these concerns and the likelihood of gaining assistance from them, they were not able to help prevent the many things that were occurring in the community. For example the Berndts were unable to assist Karloan who was their primary informant, from eviction from his home along the river banks at Murray Bridge, and at the time the Berndts had camped alongside Karloan on and off over a number of years. So how is it that during the 1930s Nungas would have the power or even the support from the white

¹³⁵ Royal Commission into Hindmarsh Island Transcript; p 179.

¹³⁶ Means white person.

¹³⁷ Royal Commission into Hindmarsh Island Transcript pp 4275-4276

community to prevent the building of the barrages, when our lives were under the total control of the *Aborigines Act*. The reality in fact is that nothing has changed; there is little that we are empowered to do to prevent the destruction of the ruwe.

Our struggle to have our voices heard is a universal struggle of indigenous peoples, particularly when we express deep sadness and grief at the times our ruwe is at risk.

Trask tells the story of Hawaii, a story that is ours, a story we come to know well by the end of the Kumarangk massacre of our cultural rights, dreams and visions:

Here, the hidden racism of anthropological work is made manifest through Native challenge. When push comes to shove, anthropologists and archaeologists say what they really think: *they* are the experts on Native culture; they have superior knowledge of it; Natives, by comparison, are uninformed and untrained, and should not, therefore, have control over their sites and culture. In this political context, foreign ‘experts’ with the support of local and state government, including planning and other legal processes, are pitted against “emotional” Natives who have nothing to rely upon but their personal and cultural integrity in asserting that their sacred places and beloved lands must not be damaged.¹³⁹

The finding of the Royal Commission was that ‘secret sacred women’s business’, was fabricated, for the purpose of obtaining a declaration under section 10 of the *Aboriginal Torres Strait Islander Heritage Protection Act 1984*, (Cth), to prevent the construction of the Hindmarsh Island bridge.¹⁴⁰ In her final Report Commissioner Iris Stevens applied logic to the situation:

¹³⁸ Personal communication to the author from Uncle Ron and Auntie Lola Bonney during 1988.

¹³⁹ Trask, H, 1993:165.

¹⁴⁰ Stevens, Iris, 1995:287.

Unless an analogy of the bridge as a form of contraception is accepted, Dr. Fergie's attempt to comprehend and translate what she was told by Doreen Kartinyeri, with comments from a few others, does not explain why the cosmos and the Ngarrindjeri women would be rendered sterile by the construction of the bridge. 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, or by what was already known of Ngarrindjeri culture.¹⁴¹

But what is logic in the face of Nunga or anyone's perceptions and religious views of the world? What has logic to do with ngaitjes and our spiritual relationship to ruwe? These are ideas that occupy little space in western philosophy, which is why Iris Stevens was unable to understand that the building of a bridge would harm women. The fact that women's business was not known by other Ngarrindjeri women and white anthropologists is not a reason to exclude the possibility that it existed. Sacred knowledge was restricted in traditional Nunga culture. The fact that it was not accessible or known of is just as much evidence of its restricted nature as it is of its absence.

The Commissioner presided over and interpreted the core of our spirituality, from a place of Eurocentric beliefs, a place of opposition to our Nunga understandings and meanings. The Commissioner failed to consider the wholeness of our culture and its

¹⁴¹ Ibid:241.

inclusion of law, language, land, sacredness, gathering and weaving, song and dance. Iris Stevens failed to understand that our culture is living as we are and the fundament or the basis of our culture breathes from the land.¹⁴²

Commissioner Stevens in the following quote reveals the extent of her knowledge and also the extent to which she depended upon the advice given to her by 'white male experts' on the culture and traditions of miminis when she said:

A female figure in the landscape is nowhere described in any configuration in the extensive literature relating to the area. It directly contradicts the well known Ngurrunderi legend based rather on a male figure in the same landscape.¹⁴³

What Iris Stevens has not understood is that there are many stories that weave throughout the landscape. Ngurrunderi is just one story which has become more popular, it was a story early settlers could relate to and understand more easily than some of the more profound or shorter stories.¹⁴⁴ The epic proportion of Ngurrunderi rendered 'him' god-like, an idea they understood. Indigenous song lines also criss-cross the ruwe of the southern country. The situation is not as Clarke would have us believe, that is, extensive song lines and secret sacred women's business were limited to the central desert region. There is not just one male line imprinted in the landscape, the body and song of women are also there. Recording the maleness in the landscape is the coloniser's way of knowing. Our mother in the landscape was unknown to them.

¹⁴² See also Bird, G, 1996 :106.

¹⁴³ Stevens, Iris, 1995:276-278

Iris Stevens in her report concluded:

There is no evidence in the rich ethnographic data relating to the Lower Murray and Lakes region that would support the existence of the degree of women's religious independence from men, such as has been recorded in the Western Desert. Traditional Ngarrindjeri culture was remarkable in that, like only one or two other places in Australia, gender-based differences in the sense of inclusion-exclusion in religious life were minimal.... The Seven Sisters dreaming story was, however, never part of the Dreaming of the Ngarrindjeri people. It was part of Western Desert mythology and is likely to have been introduced by Doreen Kartinyeri.

Given the extent of the detail provided by the Berndts and others concerning traditions, customs and mythology relating to conception and birth, it seems highly unlikely that the possibility of amajor dimension of tradition of the proportions claimed for the women's business would have been entirely overlooked by anthropologists, ethnographers and historians before discovery by Dr. Fergie in 1994.Such a proposition in any event necessarily ignores the other evidence which suggested that as at March 1994 there was no tradition or shared belief of Ngarrindjeri women relating to arcane female practices specific to the area of Hindmarsh Island and Mundoo Island, the waters of Goolwa Channel, Lake Alexandrina and the Murray Mouth.¹⁴⁵

¹⁴⁴ I have also covered other aspects relating to the use of the Ngurrunderi story in the christianising mission in chapter 4.

¹⁴⁵ Stevens, Iris, 1995:280. Dr Fergie is criticised by both Clarke and Jones throughout the hearing and accused of importing a western dessert construct of restricted women's business, which they claim

Iris Stevens speaks of Dr. Fergie as a 'discoverer' of women's business. The report of Iris Stevens has us rendered mere objects of anthropology, our identity as Stevens views it is determined by white experts, and male at that. Stevens in limiting the Seven Sisters to the Western Desert region has overlooked the presence of the Seven Sisters throughout most other regions of Australia, including the area of Goolwa. There are other recorded and published accounts of the Seven Sisters and their relationship to miminis outside of the Western Desert region. There are also unpublished accounts which live in the realm of secret sacred and are held in the cultural memories of its custodians.

Commissioner Iris Stevens reached her conclusion based upon the view that white academic anthropology held the answers. This is a problem which is experienced by indigenous peoples universally. Vine Deloria Jnr. speaks of this situation that exists also in North America:

..the realities of Indian belief and existence have become so misunderstood and distorted at this point that when a real Indian stands up and speaks the truth at any given moment he or she is not only unlikely to be believed, but will probably be publicly contradicted and 'corrected' by the citation of some non-Indian and totally inaccurate 'expert'.¹⁴⁶

Iris Stevens with the sweep of a pen declared '..the whole claim of the women's business from its inception was a fabrication.'¹⁴⁷ In reaching this conclusion Stevens

was the basis of the Ngarrindjeri restricted women's business in her report to Professor Saunders, see Royal Commission into Hindmarsh Island Transcript pp3657-3658.

¹⁴⁶ Deloria, Vine, Jnr, statement made at the 1982 Western Social Science Association Conference: quoted in Churchill, Ward, 1992:190.

¹⁴⁷ Stevens, Iris 1995:298

failed to engage in any discourse about the impact of colonialism. This was her conclusion even though she had not heard from the proponent women, nor heard evidence of the effects of dispossession, the impact of colonialism and christianity. She sought no evidence to assist her in understanding the conflict between the proponent and the dissident women, or evidence of women's business from other areas outside of the western desert region. The Commissioner's findings were drawn from a narrow field. The relationship of culture to land was considered and dealt with as being about the environment as though culture could be separate from the land. From a Nunga perspective land and culture are the one and inseparable whole.

The Nunga relationship to ruwe as I have covered in chapters 1 and 2 is different from the krinkiri one. Ours is one of ownership in the greater sense of a custodial ownership, we are taking care of the land for the generations yet to be born. Australia is a signatory to the *Ramsar Convention* on Wetlands of International Importance, and in 1985 the Lakes and Coorong, the islands including Hindmarsh Island, and the Murray Mouth were nominated by Australia for protection under the *Ramsar Convention*. The State government has responsibility to ensure they are protected. The building of a bridge to Hindmarsh Island will guarantee the lands in this area are opened up further to development, threatening this major wetlands region.

We continue to be dispossessed by muldarbi theories. In the past the doctrine of terra nullius secured the stolen territory of colonists, today theories based on the power of muldarbi to construct our identities and the terrain in which we are 'allowed' to

survive perpetuate their security of tenure. Catharine MacKinnon writes about how their ways of knowing retain a security of place and power:

Theories of right knowing are epistemologies. An epistemology is a story of a relation between knower and known. In the history of thought, this relation has been variously cast as a relation between subject and object, value and fact, phenomena and noumena, mind and matter, world and representation, text or evidence and interpretation, and other polarities and antinomies. The point of such distinctions is to establish an account of how knowing connects with what one purports to know. One purpose of this has been to establish an authoritative account of the real in order to expose errors and delusions conclusively in an agreed-upon way. The point is to establish world in mind. Science, for example, seeks empirical certainty over opinion or fiction or delusion or faith. All approaches to knowledge set up modes by which to tell whether what one thinks is real, is real. This connection embodies what is called methodology; adherence to it defines what is called rationality. Method thus puts into operation a way of acquiring that knowledge that a particular epistemological stance approves as real.¹⁴⁸

In seeking the truth and establishing it within their own known boundaries the Commission has both fuelled and written the master text of the coloniser. The nature of 'truth' the Commissioner would report to the state was clear from the beginning of the inquiry. The expense and pretence of a Royal Commission could have been avoided although from the colonial government's point of view the finding of the

'truth' of fabrication provided them with important ammunition, the further delegitimising of aboriginality, culture and laws. A new Nunga stereotype was founded, we are now all 'liars'.¹⁴⁹

At the beginning of the inquiry the dissident women stated their reasons for not appearing before the Commission, and those who did give evidence had difficulty conveying our ideas of creation, secret-sacredness and law. The manner in which the Commission's Counsel Assisting David Smith took the following evidence from Ngarrindjeri man George Trevor shows either how difficult the communication of our beliefs and ideas are or how the coloniser has become the 'expert' in the resistance to an understanding of our laws:

Q. How did you know that by connecting the island to the mainland by a bridge was somehow offensive to its significance as a place of women's business?

A. I think it is just common sense.

Q. But you didn't know anything about the content of the women's business?

A. No I still don't know any of the content.

Q It may be that a bridge from the island to the mainland would have no affect on -

A. It is still going through our waters.....

Q The importance of the waters is something to do with women's business is it?

A. It very well could be, but it is important to the Ngarrindjeri culture because of the meeting of the waters. I didn't want to say this, but the place of waters

¹⁴⁸ MacKinnon, Catherine, 1989:96-97

¹⁴⁹ A thought that was first expressed to me by my mother during the inquiry.

relates to what we call - the Ngarrindjeri people call Ngaitji, which is each clan group's symbolic totem so to speak. Those places like that is where these things breed, where they live, where they feed, all those things. You upset the totem area you are upsetting everybody. But I don't expect you would understand that, the Ngarrindjeri Ngatji.

Q. Let me put a suggestion to you: what you are talking about is a disturbance to the environment. Is that right?

A. No, more than that. To what those Ngatji are to the people. They are not just animals and fish and snakes and things to us. They are real. They are more like people. Spiritual.

Q. So it is really nothing to do with women's business, is it?

A. It is combined with all those things.

Q. You were saying that the island is significant because it is a place of women's business, and that a bridge linking the mainland to this place of women's business would be a desecration. That's what you're saying is it?

A. Yes, there is no way -

Q. And you don't know, do you, by necessity, about what the women's business is, do you?

(Witness shakes his head)

Q. So you cannot tell us, can you, in what way the bridge would affect the spiritually of the island, which is women's business, can you?

- A. No, I have no way in the world of explaining that to you. I never come here to talk about the women's business on that site.
- Q. You are not in a position to talk about it, are you?
- A. Because I can't, I'm a man.
- Q. That's right. So your objection to the bridge really comes down to an environmental objection, isn't it?
- A. No, a spiritual.
- Q. Is there some other spiritual aspect to the island which would be affected by a bridge, is there, not women's business?
- A. I just finished talking to you about it, Ngaitji related.
- Q. I want to put a label on it so that we can understand it. Is it the case that what you are talking about - that is, that a bridge cannot go to the island - is to do with some other spirituality of the island, not women's business?
- A. I'm talking about my business.
- Q. Can you tell us as much as you can about that.?
- A. I said it just now, N-G-A-I-T-J-I
- Q. Which is what you are talking about, is a question of protecting the island from a lot of people coming to the island and ruining it. That's what it is isn't it.
- A. You interpret it as environment, I don't. We have different interpretations it seems. We cannot, as Aboriginal people, separate environment and culture. They go hand in hand.

- Q The Ngaitjis, that is the bird symbols and totems for the clans and people, are in fact the wildlife, aren't they?
- A. As you view them, yes.
- Q. Why are they different from-?
- A. Because - no, I can't talk to you about that. It is plain to see you would never understand about that anyway.
- Q. I am suggesting that your objection to the bridge, in the end, boils down to really protecting the island from too many people coming onto it and degradations that would lead to in terms of wildlife, plants and that sort of thing. That's what it is about, isn't it?
- A. Well, that's what you are calling it.
- Q. You say it is more than that, do you?
- A. Yes.¹⁵⁰

The demeaning of our culture is shared with others, such as Olney J in the Yorta Yorta people's native title application to the Federal Court, who made the following comments:

The main thrust of contemporary activity by members of the claimant group has to do with the protection of what are regarded as sacred sites and the proper management of the land. Oven mounds, shell middens and scarred trees were described by a number of witnesses as sacred and deserving of protection. Curr describes the construction and function of ovens which,

understandably, were used to cook food. Some were still in use in his time whereas others showed evidence of protracted disuse. From the size and location of the ovens Curr drew conclusions as to the density of population in earlier times. These mounds are regarded by contemporary Yorta Yorta people as sacred. So too are shell middens, which are nothing more than accumulations of the remains of shell fish frequently found on the banks of rivers. Trees from which bark has been removed to make canoes or other objects, such as coolamons, are also treated as sacred by some, and significant by others. Curr refers to fine old red gums "off which we noticed many a canoe had been stripped in old days". There is no doubt that mounds, middens and scarred trees which provide evidence of the indigenous occupation and use of the land are of considerable importance and indeed, many are protected under heritage legislation, but there is no evidence to suggest that they were of any significance to the original inhabitants other than for their utilitarian value, nor that any traditional law or custom required them to be preserved.¹⁵¹

The above comments do nothing to deter the environmental vandalism we are surrounded by. At about the same time this judgement was handed down an old canoe tree¹⁵² within a few kilometres of Kumarangk was ring barked and covered by racist language. These actions when directed towards sites of significance to Nungas become acts of environmental racism.

¹⁵⁰ Royal Commission into Hindmarsh Island Transcript, p 6423-6425, also cited in Hemming, S, 1996:27-29.

¹⁵¹ *Members of the Yorta Yorta Community v the State of Victoria and Ors (1998)*, Olney J at p122.

The High Court in the recent decision of *Kartinyeri*,¹⁵³ validated the *Hindmarsh Island Bridge Act 1997*. The legislation was enacted to prevent further section 10 applications of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* for a declaration to prohibit or restrict the building of a bridge to Kumarangk.

5. 9 Genocide in your face: its not happening¹⁵⁴

The struggle for survival is a struggle white people in this country have little or no comprehension of, if they even know that it exists. Our lives are filled with trauma; it is on a personal level, a family level and a community level. The trauma is also now increasingly in the land and the natural world. We see our reflection in the land; our health is dependent upon the health of ruwe. Genocide is relentless. The muldarbi has not stopped drawing blood. The form genocide takes now is more covert than when we were openly massacred, or driven from our lands in chains, murdered and starved to death; the state has adopted more deceitful and less conspicuous ways of reducing us.

The High Court said they put an end to the rule of terra nullius, but they merely created the illusion of its death, as the muldarbi translated itself into the language of extinguishment, and found new forms of legitimacy. Nungas who are unable to

¹⁵² The area prior to land clearing was filled with water, lakes and river systems, the old people travelled by canoe, and the canoes were carved from the bark of the trees.

¹⁵³ *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722.

prove, in the face of colonialism, dispossession and genocide, an unbroken and original relationship of continuity with their ruwe, a ruwe that is free of any common law or statutory title, will be construed as peoples extinguished of any 'native title rights'. Some Nungas may be able to jump the hurdle of proof to establish that they are native title holders, or in the words of Brennan J:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revised for contemporary recognition.¹⁵⁵

However, the title we are allowed to claim remains open to being washed away or vulnerable to extinguishment. The application for native title by the Yorta Yorta people in the Federal Court was denied, as Olney J decided they were unable to prove a continuing connection between the traditional ancestors who originally held native title:

¹⁵⁴ Daishowa a mutinational corporation sued the Friends of the Lubicon Cree, in the Canadian courts for defamation, for their use of the word 'genocide' as a description of the destructive development to the Lubicon lands.

¹⁵⁵ See *Mabo v Queensland (1992) 175 CLR 1*: 59-60, see also 184-188 per Toohey J.

It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim; and the dispossession of the original inhabitants and their descendants has continued through to the present time. Although many of the claimant group reside within the claim area, many do not. No group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it. The claimant group clearly fails Toohey J's test of occupation by a traditional society now and at the time of annexation (*Mabo No 2*, p 192) a state of affairs which has existed for over a century. Notwithstanding the genuine efforts of members of the claimant group to revive the lost culture of their ancestors, native title rights and interests once lost are not capable of revival. Traditional native title having expired, the Crown's radical title expanded to a full beneficial title (*Mabo No 2* per Brennan J at p 60).¹⁵⁶

To restore our physical relationship to the land we are compelled to go before the Native Title Tribunal and the Federal Court to prove the extent to which our nativeness has survived genocide. If nativeness is not proven to the satisfaction of the tribunal and the Federal Court, according to the principles identified in the High Court decision of *Mabo (No 2)*, our nativeness is extinguished. Extinguishment is a form of genocide. In Aboriginal law the power to extinguish Aboriginal title cannot be, because the title is given to us by the Creator not for the sole purpose of ownership,

¹⁵⁶ *Members of the Yorta Yorta Community v the State of Victoria and Ors* (1998), Olney J at 121.

but also for the purpose of custodianship of the land. Only our creative laws can lawfully alter our relationships to ruwe.

The consideration given to colonialism and genocide in *Mabo (No 2)* does nothing to heal past violations or to ensure our protection from continuing acts of genocide. The High Court omission has come back to haunt us, and can be identified in the judgement of Olney J, in the Yorta Yorta People's Native Title application:

In earlier times, following European settlement in the area, it was the practice to remove skeletal remains located at Aboriginal burial sites and take them to Melbourne, and elsewhere, for scientific examination. In more enlightened times many such remains have been returned into the custody of representatives of the Aboriginal people for reinterment in the areas from which they were removed. In the claim area reburials have been conducted since about 1984. There can be no question about the importance of the returning of remains to the appropriate country but the modern practices associated with their reburial are not part of the traditional laws and customs handed down from the original inhabitants.¹⁵⁷

The question of obtaining permission to enter upon or use the resources of the claim area was raised by a number of witnesses. The traditional position, according to Curr ...was that both individuals and families amongst the Bangerang had particular rights to certain lands but in practice they were rarely insisted on except in the case of an encroachment of a person not of the tribe. ... There is overwhelming evidence that Aboriginals and non-Aboriginals

alike enter, travel through, live, fish and hunt within the claim area without seeking permission other than such as may be required by State or Commonwealth law. The tide of history has undoubtedly washed away any traditional rights that the indigenous people may have previously exercised in relation to controlling access to their land within the claim area.¹⁵⁸

What with small-pox, poisoning, massacres, rape, torture, and round ups, it is very difficult to insist that the murderer pointing a gun at your head respect your laws and humanity. *Mabo (No 2)* endorsed the genocidal policy of extinguishment. The federal government has entrenched this policy in the *Native Title Act 1993*, and further affirmed and extended it in the *Native Title Amendment Act 1998*.

The struggle for recognition of who we are has become more difficult, post-*Mabo (No 2)*. When terra nullius was clearly identified as the muldarbi, there was a movement towards changing the law and finding ways of pulling us from the belly of genocide, but now we are left with merely the illusion of change; extinguishment has replaced terra nullius but is equally genocidal in its impact. Our struggle to survive genocide is now more complex, we are left to explain why native title is a muldarbi. We are working against the tide of history and a dominant culture which is under the impression that something good has happened, when the muldarbi has merely changed its mask. A campaign waged in the Australian media, created confusion about the meaning of the *Mabo (No 2)* decision. The media reports were encouraging

¹⁵⁷ Ibid: 124.

¹⁵⁸ Ibid:126.

of a fear that the decision would set a precedent for the right of Nungas to claim the entire Australian continent.¹⁵⁹

The contemporary face of genocide can also be seen in the control the state exercises over Nunga children taken from families and nations by the criminal justice system and welfare policies. The removal of Nunga children, as in the past, is still today viewed as being “in the best interests of the child”¹⁶⁰. Nunga children are detained by the juvenile justice system and a South Australian study found that while the total number of children admitted to institutions had decreased, the ratio of Aboriginal to non-Aboriginal children had increased.¹⁶¹ Aboriginal children are almost 20 times more likely to be held in detention than other children.¹⁶² In Western Australia Aboriginal children comprise 57.9 percent of children incarcerated, yet they are only 2.7 percent of that state’s juvenile population.¹⁶³ This situation is not likely to improve. Trends indicated by the Aboriginal Torres Strait Islander Social Justice Commissioner, infer that the problem already of crisis proportion is likely to deteriorate further still in the future:

In 6 years, by 2001 there will have been a 15 percent increase in the number of Indigenous kids in detention. In 16 years, by 2011 there will have been a 44 percent increase in the number of Indigenous kids in detention.¹⁶⁴

¹⁵⁹ Australian Mining Industry Council, Advertisement, Age, Aug 14, 1993; Weekend Australian August 21-22 1993.

¹⁶⁰ The forcible removal of Nunga children from their families was also argued in *Kruger* as being in the interests of the children I have discussed this decision in chapter 4.

¹⁶¹ Report of South Australian Office of Crime Statistics, April 1992.

¹⁶² Australian Institute of Criminology, ‘Persons in Juvenile Corrective Institutions’ No. 66, March 1994, Compiled by Dagger, D. and ed. Mukherjee, S., Table 9, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Third Report’ 1995:14-15.

¹⁶³ Ibid:15.

¹⁶⁴ Ibid:15.

The federal government established the *Royal Commission into Aboriginal Deaths in Custody* in 1987¹⁶⁵ to investigate the deaths of Nungas occurring in the custody of the police or prison and juvenile authorities.

In 1987, the year the Commission was announced, an individual Aborigine in Western Australia was not only twenty – seven times more likely to ultimately die in prison than a non-Aboriginal Western Australian, but was also three times more likely to die in prison than a Black South African.¹⁶⁶

At the conclusion of the inquiry the Commissioners did not find that even one of the 99 deaths investigated was ‘the product of deliberate brutality or violence by police or prison officers’.¹⁶⁷ Nungas¹⁶⁸ have referred to the Commission as a whitewash of the attempted genocide that is still occurring in this country, because neither the State nor its agents were held liable for any of the deaths. The inquiry into the death of John Pat of Roebourne in Western Australia was one where no one was held liable for the death of this young man. Jeannine Purdy argues that in the final report into the death of John Pat there were a number of omissions of evidence:

The first is the fact that a few days after Pat’s death in police custody, when an Aboriginal woman was taken into custody by the police, the Roebourne Aborigines rioted, and continued to riot until police released their prisoner. This would indicate to me that the Aborigines held police responsible for Pat’s death. However, the Commissioner regarded this incident as beyond the scope of his inquiry. ...The second matter, I can refer to only obliquely as it was

¹⁶⁵ Royal Commission into Aboriginal Deaths in Custody was established in response to international pressure and questions put to the UN WGIP and other UN forums.

¹⁶⁶ Purdy, Jeannine, <<http://www.omen.net.au/~dicwc/purdy-paper.html>>, p2.

¹⁶⁷ Ibid, and taken from the *National Report into Aboriginal Deaths in Custody*, 1.1.3; 1.2.2.

¹⁶⁸ Here again I am referring to those Nunga voices of the silent majority, not the vocal minority.

expunged from the Commission records by order of the Commissioner. During the hearing, a statement from Mavis Pat, John Pat's mother, was tendered as evidence. Junior Counsel for the Police Officers objected to a comment in that statement and requested that it be deleted. Indeed I am only able to refer publicly to this matter at all because Junior Counsel omitted to request that his application and argument be suppressed from publication, as was normal practice during the hearing. His argument was that the comment identified his clients, the police officers, 'and implies some wrong-doing on their behalf'. That is, the comment was to be deleted precisely because it indicated that Mavis Pat thought she knew what had happened to her son. The Commissioner ordered that the comment be deleted, and if I were to tell you what Mavis Pat said, I would risk a fine of up \$2,000 or 12 months imprisonment (*Royal Commissions Act 1973*, ss. 6D(3), (4)).¹⁶⁹

At the completion of the inquiry into the death of Malcolm Smith, Commissioner Wooten referred to the removal of Aboriginal children under the assimilation policy as amounting to genocide,¹⁷⁰ and yet Nunga children are still being detained in juvenile institutions throughout Australia at levels incomprehensible to white Australia.¹⁷¹ As I have discussed above the High Court in *Kruger* dismissed claims that the removal of our children to state institutions was an act of genocide.

¹⁶⁹ As above fn 166, p10.

¹⁷⁰ Royal Commission into Aboriginal Deaths in Custody, Report into the Death of Malcolm Charles Smith, by Commissioner Wooten, 1989, Canberra AGPS.

¹⁷¹ Australian Associated Press, reported on Friday April 9 1999; a complaint to Western Australia's Police Commissioner Bob Falconer, that more than half the Aboriginal youths in custody were beaten. An Aboriginal Legal Service (ALS) submission to a state parliamentary committee on crime reported 52 per cent of Aboriginal youths in custody were beaten and only a third were informed of their rights. Eighty-five per cent of Aboriginal youths in custody were verbally abused and 65 per cent were assaulted. The ALS survey also showed Aboriginal youths made up only four per cent of the youth population, but accounted for 20 per cent of juvenile court appearances.

The Royal Commission into Aboriginal Deaths in Custody recommended processes to reduce incarceration levels but they have not been implemented. Indeed, incarceration levels of Nungas continue to rise and the deaths in custody continue to haunt both indigenous and mainstream Australia.¹⁷² We were left at the end of the inquiry asking the question “what and who is going to change this to make sure that it doesn’t happen again?” There is no evidence that the incarceration of Aboriginal children will stop or even decline in the near future. The Commonwealth government followed the Deaths in Custody Commission by establishing another inquiry to hear the stories of a past history of the removal of Aboriginal children.¹⁷³ This inquiry heard the stories of the forced removal of Nunga children, and at its conclusion no compensation or healing process was established for those now known of as the ‘stolen generations’, nor was an apology made by the head of government.

The face of contemporary genocide is not death by shooting or poisoning, it is death that comes out of pain and severe trauma. Our pain and suffering is so big many of our people let go of life. They have found new ways, ways of the modern world to kill the pain. A pain that is ended by suicide, drugs, alcohol or altered mind states, and new identities. If we were to measure the impact of genocide, and the experience of it, some of the worse excesses of genocide would be found in mental health and health statistics of Nungas. Our profile is of third world standard in a country which enjoys being a leader amongst global capitalist economies. If you study our historical

¹⁷² Reported in the Age Newspaper Thursday 15 April 1999, ‘Jail deaths report to stay secret’ by Nicole Brady, the recommendations of a report into the increasing rates of suicide and self harm in Victorian prisons will remain secret after the State Government revoked its commitment to making the findings public. An independent panel was appointed to review prison procedures after jail deaths hit a 10-year high in the year to 30 June last year, when 13 people died. Five people have died in the state’s prisons since 1 July last year.

¹⁷³ Wilson, R, 1997, see *The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*.

profile in self-determination, land ownership and management, housing, health, cultural integrity, maintenance of languages, and education, you would identify policies that were destructive and subjugating of our Nunga being. We are disappearing peoples.

The process of defining Nungas out of existence continues on from the old policies of assimilation. Contemporary examples can be found scattered throughout Commonwealth 'Aboriginal Affairs' policy. The Department of Employment Education and Training, and their 'Abstudy' policy, relating to Aboriginal education, construct 'traditional' and 'non traditional' Nunga communities. This policy deems Nunga youth from 'traditional' communities as being entitled to an independent allowance, because of their initiated status. This same allowance is not available to Nunga youth of the same age who reside in 'non-traditional' communities. This policy excludes Nunga youth from Victoria, NSW, and Tasmania. It is a policy which reflects past definitions on 'Aboriginality' which distinguished between 'half-caste', and 'Aboriginal native'; as in the past, the 'non-traditional' is expected to become further absorbed into white Australia, while the 'traditional' is treated differently separated by policy from the constructed 'non traditional'.

5.10 Genocide: the celebration of it

The celebration of the coming of Columbus to the Americas marks the attempted genocide of the Native Americans. The equivalent for Nungas is the coming of Cook

and the Australia Day celebrations. These celebrations illustrate the state's support for European racial, cultural and spiritual superiority. The continued celebration of colonisation is a measure of how far we need to travel before we are able to take states seriously in their rhetorical attempts to improve the human rights of Nungas.¹⁷⁴ The following quote is taken from an intervention made by Professor Glen Morris to the UN Working Group on Indigenous Peoples:

The use of a state apparatus for the promotion of national holidays, festivals, the construction of monuments, or other acts that serve to celebrate, either explicitly, or implicitly, the genocide and colonization of indigenous people is tantamount to the promotion of race hate and racism against indigenous peoples. Such activity is proscribed by several international instruments, and is recognized as promoting intolerance and discrimination. When an ideology that elevates to national hero status the architect of indigenous genocide, it infests the fabric of society. School children, from the time that they can reason, are inculcated with the notion that theft equals righteousness, colonialism equals liberation, that indigenous peoples were and are savages, and that Euro-American superiority has been vindicated through the colonialism of the western hemisphere. This holiday promotes the idea that indigenous peoples are inferior, and consequently, promotes racial intolerance, or worse, it promotes and justifies deliberate policies of indigenous dispossession and destruction- such as those that litter the entire political and legal landscape of the United States.¹⁷⁵

¹⁷⁴ Watson, Irene, 1992:11-13, for a discussion on the UN theme 1993 'Indigenous People – a New Partnership'. The International Year for the World's Indigenous People is result of UN General Assembly Resolution 46/128 of the 17th December.

Ward Churchill and others argued genocide as a defence to charges laid against members of the American Indian Movement for disrupting a Columbus Day celebratory parade in Denver on October 12, 1991.¹⁷⁶ The defendants were charged with refusing to obey a lawful police order, obstructing a public thoroughfare, and disturbing the peace. The defendants argued the celebration of genocide was unlawful, particularly when the genocide of Native Americans was a continuing phenomenon. The defendants argued that they had acted lawfully in attempting to halt the commission of a crime against humanity. The charges against the defendants were not dismissed but a Denver jury, acquitted all defendants on all counts on June 26, 1992. And in post-verdict statements to the press, the jurors clearly indicated that they had been convinced by the defence that it was the Columbus Day celebrants and various collaborating officials, rather than the defendants, who had engaged in wrongful activities.¹⁷⁷

During the Australia Day celebrations in 1988, the state celebrated through the re-enactment of the invasion. The replica tall ships of Cook sailed into Sydney harbour where they were met by a protest of more than 50,000 people, calling for the end to the celebration of invasion and genocide of indigenous peoples.

¹⁷⁵ Morris, Glen, 1992.

¹⁷⁶ Churchill, W, 1994:11.

¹⁷⁷ Ibid:45-46.

5.11 Where can our stories be told in a forum which will not whitewash the blood and act as though they never heard a scream?¹⁷⁸

The new assertion of claims to self-determination as validated by more supportive procedures and institutions is literally experienced as a matter of life and death for the ethnic entity as well as for constituent individuals and groups. A call for the rights of peoples is in many instances a cry of help to those confronted by the terrifying prospect of genocide.¹⁷⁹

The domestic courts and tribunals of the state will not hear evidence of genocide the state itself has committed.¹⁸⁰ The crimes are only recognised in international law, and are outside the domestic jurisdiction of the genocidists. The state has an interest in obscuring the truth as we have already seen from the results in the final report of the *Royal Commission into Aboriginal Deaths in Custody*, and the *Stolen Generations Inquiry*. It is necessary to establish a tribunal which is free from the interference of the Australian state and gives voice and support Nungas.

The situation in Australia requires international intervention, but the possibility of this occurring within existing international courts or tribunals is problematic. The *International Court of Justice* (ICJ) will only hear disputes between states,¹⁸¹ or

¹⁷⁸ This heading is inspired by my friend Alice Dixon, and her son Kingsley Dixon who died in custody. It was alleged that the walls of the prison cell where Kingsley Dixon was found dead were freshly painted soon after his death.

¹⁷⁹ Falk, Richard, 1988:20.

¹⁸¹ Statute of the International Court of Justice, Article 34 (1).

matters in which the states have consented to the jurisdiction of the ICJ.¹⁸² The ICJ provides an advisory opinion on questions of law, as it did in the *Western Sahara* decision.¹⁸³ This matter was brought before the ICJ by the United Nations General Assembly, for an opinion as to whether the people of the Western Sahara were eligible for decolonisation following the withdrawal of Spain from the region. The court decided that territories inhabited by peoples living as organised societies were not considered a terra nullius landscape empty of peoples and open to state acquisition on the basis of occupation. Further the court decided that the Western Sahara peoples were political entities divested with the political sovereignty able to enter into relations with other sovereign states.

Before *Mabo (No 2)* decision was handed down, Paul Coe on behalf of the Wiradjuri, Ngunawal and Arrente nations wrote to the Secretary-General of the United Nations. Coe sought an Advisory Opinion from the International Court of Justice on the right of Nungas to self-determination, land and culture.¹⁸⁴ This process fell by the way in light of the dominant position the *Mabo (No 2)* decision took, followed by the enactment of the *Native Title Act 1993*. Both of these developments were viewed by the UN as progressive advancements towards the rights of indigenous peoples.¹⁸⁵

The newly constituted *International Criminal Court*¹⁸⁶ was established to hear crimes against humanity. However because of the statist character of the UN and its created

¹⁸² Ibid:Article 36(1).

¹⁸³ *Western Sahara Advisory Opinion*, 1975 I.C.J. 12.

¹⁸⁴ Brennan, F 1993:27, where Brennan quickly concludes that Nungas have no capacity or international personality to seek an opinion from the UN.

¹⁸⁵ Committee On the Elimination of Racial Discrimination 54th Session 1-19 March 1999, Draft decision (2) 54 on Australia of the Committee on the Elimination of All Forms of Racial Discrimination: Australia. CERD/C/54/Misc.40/Rev.2.

¹⁸⁶ This court was established in Rome between 15-17 July 1998.

bodies the court is likely to present the same insurmountable obstacles to Nungas as the ICJ when we attempt to invoke proceedings against the state of Australia for the crime of genocide.

In March 1999 an application from Australian indigenous groups represented by ATSIC was heard by CERD. In the application it was argued that significant parts of the 1998 amendments to the *Native Title Act 1993* (Cth) (NTA) were not in accord with principles of racial non-discrimination and equality laid down in CERD. The Committee has the mandate of Article 14 of the Convention to formulate an opinion. Article 14, 7(b) also permits the Committee to make 'suggestions and recommendations'. There are no penalties imposed other than the possibility of 'shaming' a country into correcting any violations of the convention. Violations are made public through the Article 8 requirement on the Committee to compile an annual report, in which a summary of its recommendations is made. At its 54th Session CERD decided that the *NTA 1998* amendments discriminated against indigenous title-holders under the validation provisions, the confirmation of extinguishment provisions, the primary production upgrade provisions, and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land issues. The committee found that there was a lack of participation by indigenous communities in the formulation of the amendments and was concluded without their consent. (This has also been a criticism made by the Nunga community regarding the *NTA 1993*, but this was not raised with the committee).¹⁸⁷

¹⁸⁷ Committee On the Elimination of Racial Discrimination 54th Session 1-19 March 1999, Draft decision (2) 54 on Australia of the Committee on the Elimination of All Forms of Racial Discrimination: Australia. CERD/C/54/Misc.40/Rev.2.

The application initially made to CERD in 1998 was limited in its focus to the 1998 amendments to the *NTA 1993*.¹⁸⁸ In the application to CERD it was submitted that the amendments preferred the rights of non-native title holders over those of native title holders. But the *NTA 1993*¹⁸⁹ itself enshrined racially discriminatory policies that preferred the rights of non-native title holders over those of Nungas. The *NTA 1993* validated non-native title, the colonisation process, and the dispossession of Nungas from the entire Australian continent. The *NTA 1993* Act established a regime for the registration of native title, a title that could at the most negotiate for the best deal with powerful corporations; deals that will always be weighted to the side of power. The native title created by the High Court in *Mabo (No. 2)* is an inferior title to that held by the state, and all other common law titles. The High Court in *Western Australia v The Commonwealth 1993*,¹⁹⁰ decided that the *NTA 1993* was a beneficial law. But beneficial in what way? The majority of Nungas will remain dispossessed from our ruwe as a result of the *NTA 1993* legislation and unable to protect it from damage. The 1998 amendments simply entrench this position further. The application to CERD should have referred to the *NTA 1993* in their analysis of discriminatory policies towards Nungas.

¹⁸⁸ ATSIIC online reference to the CERD application; <http://www.atsic.gov.au>, CERD heard at its fifty fourth session the application on racial discrimination against the Australian government. The matter was listed and heard pursuant to the early warning mechanism of CERD in March 1999.

¹⁸⁹ In the 1994 CERD Report the Committee found the *Native Title Act 1993*, to be a beneficial Act. In decision (2) of CERD 54th session 1-19 paragraph 5, ‘..the Committee welcomed the attention paid by the Australian judiciary to the implementation of the Convention (A/49/18, para.540). The Committee also welcomed the decision of the High Court of Australia in the case of *Mabo (No 2)*, noting that in recognizing the survival of indigenous title to land where such title had not otherwise been validly extinguished, the High Court case constituted a significant development in the recognition of Indigenous rights under the Convention. The Committee welcomed further, the *Native Title Act 1993*, (Cth), which provided a framework for the continued recognition of indigenous land rights following the precedent established in the (*Mabo No 2*) case.’

¹⁹⁰ 183 CLR 373.

This application also raised the issue that the 1998 amendments fail to provide native title holders with protection of the kind given to other landowners. But the *NTA 1993* is also destructive of native title interests, discriminating against the interests of native title holders through the validation of non-native title. The only hurdle for the extinguishment of native title following the *Mabo (No 2)* decision flows from the *Racial Discrimination Act, 1975 (Cth) (RDA)*, a hurdle that was perhaps the motivation behind the Keating government's high speed action to enact the *Native Title Act 1993*,¹⁹¹ to avoid or restrict the applicability of the *RDA (1975)*. It has been stated that the *NTA 1993* was the longest debated Act in the history of the Commonwealth parliament. Negotiations were entered into by the men in suits in October 1992 and were concluded with the passage of the legislation in December 1993. The process lacked the informed participation and consent of traditional owners throughout Australia, instead the Commonwealth governmental statutory body ATSIC entered into the negotiations with government along with land councils and Aboriginal Legal Services in the absence of traditional owners. We had never before seen a government so quick and eager to address the land issues of the Aboriginal nations.

The *RDA* became a law of Australia on 31 October 1975, *Mabo (No2)* was decided on 3 June 1992. The door was open for Nungas to argue that lands which could be deemed¹⁹² native title land at 31 October remained native title lands and all other titles

¹⁹¹ The *NTA 1993* was enacted in December 1993 just over 12 months after the *Mabo (No 2)* decision, considering more than 200 years of the rule of terra nullius this time frame for negotiations was seriously inadequate in its response to dispossession.

¹⁹² The common law principles are found in the *NTA 1993*; section 223 (1), The communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the

created by government actions, and grants of interest over those lands were subject to a native title. The *NTA 1993* validated title to a sector of the community who had the most to lose from the small crack of light that fell, that is those in the mining industry and the pastoral industry granted interests over land from the 31 October 1975. The *RDA* was 'relaxed' so as to validate past invalid grants.¹⁹³

I argued at the time of the enactment of the *Native Title Act 1993* that it was in breach of the *International Convention on the Elimination of All Forms of Racial Discrimination*. To enact the legislation the Federal government invoked the special measures provisions s8(1) of the *Commonwealth Racial Discrimination Act 1975*.¹⁹⁴ This was done to avoid challenges by s9(1) and s10(1) of that same Act. It is ss 9 and 10 of the Act that prevent the impairment of human rights and fundamental freedoms, or the withholding of rights which are enjoyed by persons of another race. The Commonwealth government's use of the special measures provision, was not for the sole purpose of securing native title rights, but was for the main purpose of validating non-native title. The *Native Title Act 1993* validates past acts that might otherwise have been invalid because of the existence of native title. It enables states and territories to validate past acts attributable to them. The Act provides for the validation of dispossession and land theft, and the genocidal policies which were used to complete the dispossession. The Commonwealth government proposed to establish

Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.

¹⁹³ The *NTA 1993* sets up 4 categories A-D of past invalid grants, s229, ss 15, 230. In an article Watson, Irene 1996:11, Watson, Irene 1997:220-221, I argue the *NTA 1993* was in breach of the *RDA 1984*.

¹⁹⁴ Legislation based on the international *Convention to Eliminate all forms of Racial Discrimination*, General Assembly resolution 2106 A (XX) of 21 December 1965.

a means of compensation for the validation of the coloniser's title, but at the time of writing this thesis no group in Australia has yet been compensated.

On the 18 March 1999 at its 54th session CERD made the following decision on the amendments to the *NTA 1993*:

- While the original *Native Title Act (1993)* recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade in the amended *Native Title Act (1998)*.
- The committee noted four provisions in the amended Act that discriminated against indigenous title-holders. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.
- The committee found a lack of effective participation by indigenous communities in the formulation of the amendments, which raised concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."

- The committee was also concerned that the amended Act appeared to wind back the protections of indigenous title offered in the *Mabo (No 2)* decision, and the *1993 Native Title Act*. And argued the amended Act could not be considered a special measure within the meaning of Articles 1(4) and 2(2) of the Convention, raising concerns about Australia's compliance with Articles 2 and 5 of the Convention.
- The committee urged Australia to address these concerns as a matter of utmost urgency. And to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples.

The decision of CERD is based on the idea that *Mabo No 2* and the *Native Title Act 1993*, are of benefit to Nungas and are not in breach of the *Convention to Eliminate all Forms of Racial Discrimination*. But *Mabo No 2* and the *Native Title Act 1993* are detrimental and the amending act of 1998 is merely a further erosion of and discrimination against the rights of Nungas. The above decision by CERD could be interpreted as meaning that the *NTA 1993* had the support of Aboriginal Australia and that we had given our free and informed consent to the process of negotiations entered into by Aboriginal 'leaders'. But during September 26th –28th 1993 at a meeting held in Canberra over 1000 Nungas representing peoples from Aboriginal Australia moved a resolution to stop further negotiations on the development of native title legislation. The voices of traditional owners and custodians of land and law were not fully considered in the native title negotiations that concluded in the enactment of the *NTA*

1993.¹⁹⁵ Our free and informed consent was lacking in the negotiations that lead to the enactment of the *NTA 1993* as they were also lacking in the negotiations that lead to the amending Act of 1998.

¹⁹⁵ The problems that arise when traditional owners voices are not properly represented is spoken of in the interview with Katona Jacqui, 1998: 1.

POWER OF THE MULDARBI

6.1 INTRODUCTION

The circle has woven is weaving:... to aboriginalise, colonise, capitalise, socialise, feminise... to aboriginalise, aboriginalise, aboriginalise, aboriginalise, aboriginalise, aboriginalise.....

The muldarbi as I have begun to illustrate in previous chapters takes on different forms of dominance and power. This muldarbi came to our old people in the form of small- pox, poisoned water-holes, rape, murder, and other forms which have violated the laws of the land, the laws of our old people. The muldarbi is a killer of law, land and people. I see the muldarbi as being in its final phase before we deal away with it forever. Putting it finally to rest. The work is before us, as we struggle to save the planet from an ecological holocaust. The peoples of the land are already reduced by the muldarbi; now it is the land we watch, as the natural world resists by dealing humanity an increasing occurrence of natural disasters.

The old people in their adherence and practise of the law and the singing up of law and country, have ensured balance against the influences and impact of the muldarbi,

a balance which is held through their love of law and land. The respect for law and country, and caring and sharing, are strong medicines for dissolving the power of muldarbi. So why has the muldarbi become so powerful, and what happened to these laws that previously kept the muldarbi in a place where it caused no harm? These laws still live, but their form now struggles under the increasing weight of muldarbi. What is it about the muldarbi that has enabled it to enlarge itself? Like the giant frog, is it greed? And if it is that, what has created that greed, is it trauma? In the story of the giant frog the solution of the animals was to make the frog laugh and in laughing the frog released all the world's water it had consumed, greedily, entirely for itself. The water fell back onto the land, filling the streams, rivers, billabongs and lakes to be shared by the many. And from that day the frog was no more big. I think we need to think about the source of greed, and then find the way to make the giant frog-muldarbi laugh. And make it remain small forever, taking equal share of water to all other life forms.

The laws of this ruwe, laws which come from Kaldowinyeri have been violated. There is both a women's law and a men's law which both still exist despite centuries of violations by the coloniser. However the sparsity of women's law is usually interpreted by the 'experts' of the dominant culture as being evidence for its non-existence. Irigaray writes about the extinguishment of women's mother-daughter genealogies and the scientists' claim that women's law has '...never existed except as a figment of the female or feminist imagination.'¹ Similarly the totality of the laws of indigenous peoples has been treated as a mythical representation of reality, a time in prehistory, and thus demeaned and dismantled.

¹ Irigaray, Luce, 1993(b): 24.

In this chapter I will discuss the contemporary feminist struggle and how effective or otherwise this struggle has been in dismantling one aspect of the muldarbi, the dominant white male.² In looking at the feminist struggle, I ask: what is my place in that process, a process where white women have power I don't have? Will white women in meeting the challenge to diffuse white male dominant power, undress their own muldarbi?

6.2 The muldarbi power of right knowing

Historically the muldarbi has positioned Nungas into a space of invisibility, and if we appeared at all, it has been at the lowest point in its hierarchical ordering of life. The muldarbi has positioned Nunga women, men and children in its way of seeing, and its way of seeing us is through a white male dominant racial lens. In the eyes of the muldarbi-colonisers being indigenous was to be 'known' by them as inferior, while they were 'known' to themselves as a 'scientific fact' to be superior.³ Their construction of who we are and where we are placed in their hierarchical ordering of life continues. They continue to name and define who we are, how we should look, how we should act, and what our culture is and should look like to them.⁴ The power of right-knowing functions on different levels. The state and its agencies construct

² Detmold M 1997:95 sees gendering as being wholly a function of power.

³ Blaut, J, 1993 156, suggests that agricultural societies in the European view were perceived as superior to the non-European societies who chose not to farm, and as Blaut argues should be referred to as 'non-agriculture' societies not 'pre-agriculture' societies. The latter infers superiority in European traditions.

⁴ For a further discussion on the construction of identity see, Watson, I 1997:49, I have discussed these issues in chapter 4 of this thesis.

‘the Aborigines’⁵ and other groups also have their own way of knowing who we are and how or what we should be.⁶

The power of ‘right knowing’ was exercised recently by the High Court⁷ in its decision to validate the *Hindmarsh Island Bridge Act 1997*, (Cth) legislation that will legitimise the building of a bridge to Kumarangk. The decision in *Kartinyeri* has confirmed that Aboriginal women’s business - law in the Kumarangk region is as open to violation by the coloniser’s laws as it was when Cook first arrived. In the struggle to protect the last of our sacred places do we build an alliance with white women to explode this white male dominant way of seeing and knowing us? How is it then that white women see and know us? Let’s take a look. Catharine MacKinnon has written about how we come to ways of knowing in the following quote:

The feminist theory of power is that sexuality is gendered as gender is sexualised. In other words, feminism is a theory of how the erotization of dominance and submission creates gender, creates woman and man in the social form in which we know them. Thus the sex difference and the dominance-submission dynamic define each other. The erotic is what defines sex as an inequality, hence as a meaningful difference. This is, in my view, the social meaning of sexuality and the distinctly feminist account of gender inequality. The feminist theory of knowledge begins with the theory of the point of view of all women on social life. It takes as its point of departure the criticism that the male point of view on social life has constructed both social

⁵ I refer to the constructions of identity by the state in chapter 4.

⁶ These other groups include generally the environmental movement, the women’s movement, the churches, the ambit of non governmental organisations, they all have their own particular stereotype of what an ‘Aborigine’ should be, look like and act like.

⁷ *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722.

life and knowledge about it. In other words, the feminist theory of knowledge is inextricable from the feminist critique of male power because the male point of view has forced itself upon the world, and its way of knowing.⁸

So does feminism come from a space which is male and dominant, a *muldarbi* place? Does feminism live within the horizon of this *muldarbi*? And is it stuck in male domination, taking its identity from the reaction to male domination?⁹ And is it as Irigaray suggests to us that, 'Most of the works of women today aim to describe what a woman is within the horizon of a male subject'.¹⁰ But is male domination universal, or are there pockets where the domain is balanced between women and men? I argue that the Nunga domain is one place that is free of male domination, but only just, as it is almost disappearing into the different forms that genocide takes us into. Moreover it is a domain that is invisible to those who see the world through universal themes:

...one consequence of the feminist movement's tendency to think about gender power and dynamics in terms of what we might call a universalist or essentialist form is that it depicts the structural forms that gender power plays in the white community as representing gender pure and simple.¹¹

⁸ MacKinnon, Catharine, 1987:50.

⁹ For a discussion of the Australian context see Pettman 1992:25.

¹⁰ Irigaray, *Luce*, 1996: 64.

¹¹ Crenshaw, Kimberle, 1993: 407 and see Davies, Margaret, 1998:167, for a discussion on how taking a purely essentialist approach makes difference invisible.

And further on Kimberle Crenshaw states:

If black women continue to be silenced and their stories ignored, we are doomed to have but a limited grasp of the full range of problems we currently face.¹²

We are also doomed to lost opportunity, the opportunity to learn from the indigenous horizon of balance between male and female that lives still in indigenous communities, those which are quickly disappearing under the weight of the muldarbi.

Where is feminism going as a way of knowing, if its identifications arise from and out of a response to male power? How can it ever dissolve the muldarbi from this place, when it is imprisoned within a male horizon? The thing is that the horizon can be changed. Another already exists, one which has always been known to those who kept the songs and the ceremony, which is knowing from a place of Nunganness. The muldarbi uses its power to shape the way we know, and the way we know shapes social power in terms of social inequality.¹³ So we struggle with the muldarbi against the shaping of our being with its way of knowing. We struggle with the thinking and language of our rapist. But struggle to see the horizon, as we have known it from Kaldowinyeri, and to stop it dissolving into the imposing muldarbi. We struggle for the place which is free from this 'right way of knowing', to be free to know in the way of the grandmothers. Haida elder and grandmother Lavina White speaks of the conflict between indigenous and non-indigenous world views in the following quote:

¹² Ibid 1993: 436.

That's another means the government have used to take away lands from native people was for environmentalists to help them make certain areas into parks. They feel that they can save Mother Earth if they make a few patches that are parklands. The day that they find that all of earth is sacred and all of creation is sacrosanct, then we'll have a better understanding between us. For to put certain small areas into the safety of heritage sites is not the way to go.

I was in the environment movement for a very long time and became disillusioned with them because they had their own hidden agenda. So that was when I had the final hard knowledge that there are two paradigms in Canada and that was the Indigenous Peoples way and those that came - their way. Their way I could never understand.¹⁴

And proposing a process of healing and creating the space where our indigenous views have a life, bell hooks suggests we dissolve white thinking. To dissolve the muldarbi is to think outside its perceived and imposed regimes of thought. For me, that is a process of decolonising the mind, and dissolving dominant colonial thought patterns, so that I can see the horizon from an indigenous place and space, and know the mother beneath my feet.

¹³ MacKinnon, Catharine, 1989:1x.

6.3 The culture of rape, what we call raping the ruwe

Ruwe, is the land, 'the land is our mother'. She nurtures us and from her all things grow, without ruwe there is no self. Ruwe is also known as the place of the old man, the grandfather. Kevin Buzzacott speaks about Lake Eyre and his obligation to protect the country from possible damage done to it by the draining of the artesian basin of its underground water:

..Lake Eyre, with its waterways and mound springs and all the animals and plants that belong, is a very very special place. It catches all the ancient inland rivers and creeks - many rivers from other Countries. The Old Lake calms them down like nursing a little baby. Water is life. Water is more precious than gold..¹⁵

Yet the reality of our lives and the natural world living on the edge of extinction is ignored. The non-indigenous world is progressively evolving and separating its humanity away from the natural world and its wisdom. It is they, the non-indigenous, who mostly have and continue to plunder, rape, violate and extract from ruwe, with a greed and an ignorance which seems to veil their ability to see how it will end. Irigaray suggests that "... culture has taught us to consume the mother's body - natural and spiritual without being indebted."¹⁶ Here I have taken Irigaray to mean that the culture of 'us' is the cultures of non-indigenous peoples, for it is they who have culturally developed in this way. They became non-Indigenous when they departed from their laws and lands. They became disconnected from their

¹⁴ White, Lavina, *First Nations International Court of Justice* 1996, Transcript pp73-74.

¹⁵ Taken from an open invitation by Kevin Buzzacott "Going Home to Lake Eyre", February 1999.

¹⁶ Irigaray, Luce, 1993(b) :54.

Aboriginal-being, becoming non-indigenous, individuals, and citizens of states. Some of them are like the giant frog, living outside the laws of caring and sharing. In contrast, indigenous cultures live in reverence of the mother-earth and have a culture which centres around balancing and maintaining a harmonious relationship with the mother. The pristine state of the ecology in this country prior to colonisation is evidence of that.

The earth is known to indigenous peoples as a feminine being, a mother. It is also known as the grandfather.¹⁷ While the feminine in the natural world is powerful, it is not a power which is hierarchical and dominating. For it to be that would be to become *muldarbi*, and demonising of the laws of Creation. The love we hold for the *ruwe* is unlike the christian hierarchical reverence for the father. The dimension for loving *ruwe* is whole; it is circular, not linear. The love of *ruwe*, and its energy moves through all of the organs; it is more than a thought which is sublimated into an ideology which is then used to dominate. Love of *ruwe* does not change form. It remains the same. Love of *ruwe* is a way of life; it is practised and it is sung; the songs of *ruwe* are sung across the land. The love of *ruwe* is a passionate and interdependent one, which moves throughout and unifies all things.

Ruwe is not appreciated by all of humanity as mother and perhaps that is why her rape is excused and ignored. Feminist law academic and writer MacKinnon deprecates the feminine in *ruwe*, and sees the relationship of women, like men as a social product, when she writes:

...women have no more special relation to nature, 'naturally' than men do; their relation to nature, like men's, is a social product. Man's relation to

¹⁷ Reference to Kevin Buzzacott above talking of Lake Eyre as his grandfather.

nature is probably equally profound and determinative of his being, but he is not socially limited to it.¹⁸

But who said anything about being socially limited to 'nature'? Indigenous peoples hold *ruwe* and the natural world with great reverence, unlike capitalist or marxist thought, where nature is viewed as constituting value and exchange value. MacKinnon goes on to explain:

Mother/women is, is nature; father/man works, is social. The creative, active, transformative process of work is identified with the male, while the female is identified with the matter to be worked upon and transformed.¹⁹

But indigenous cultures, unlike capitalist and marxist societies never sought to transform *ruwe*, and it is here that MacKinnon's attempt to universalise women's lives and relationships fails. Indigenous women are comfortable with the feminine identification to *ruwe* our mother, as it is both an honouring of our lives as women and it is also a reminder of our relationship and connections to *ruwe*. We are her daughters and collectively we are sisters of *ruwe*. MacKinnon expresses a discomfort with the special identification of woman to the earth and the natural world, a view which indicates their assimilation into western patriarchal perceptions of hierarchy and dominance and a movement of women away from the mother.

From an Aboriginal perspective we are all of the mother. She nurtures us, and we in return carry the obligation to ensure the nurturing is sustained for future generations. The reverence for *ruwe* and the natural world held by Nunga communities is

¹⁸ MacKinnon, Catharine, 1989:15-16.

evidenced (particularly in Australia) in the ceremonies of both male and female. Our ceremonial life is an act of honouring the mother and the natural world. The ritual seeks balance, unity and future sustainability.

The muldarbi came to our lands and sought to transform ruwe – the mother. I do not fully comprehend the reasons or the motivation behind the muldarbi's acts of rape; perhaps in the western world and its own history of centuries of alienation from ruwe it festers an indifference and inability to love the land. Or perhaps simply answered the reasons were for agriculture. One Koori expressed the feeling of alienation from land as follows:

We and the land are one. When you take it from us you kill the spirit that gives us life. We end up as shells of human beings, living in other people's countries.²⁰

The colonisers, who came to our ruwe, made no connection spiritually to our lands, nor did many of them have an Aboriginal or spiritual connection to the ruwe of their own ancestors. What connection existed for many had been severed centuries ago. They had become shells of human beings, and their own loss or alienation made it easier to rape and plunder the mother, because they did not know her as mother; to them she had become something else, she was another commodity that was dispensable in their growing consuming society.

¹⁹ Ibid, 15.

²⁰ This statement was made by Cecil Patten to the UN Working Group on Indigenous Peoples in Geneva, cited in Venne, Sharon, 1996:293.

The muldarbi referred to our ruwe when they first saw her as virgin lands. A virgin awaiting penetration. An alien thought to our culture, a rape not ever before contemplated by indigenous peoples and this is evidenced by the relationship we held with the natural world, with the mother. bel hooks holds a similar view about the different relationship we have to the land:

Indigenous men had no relationship to the land, to the world of their ancestors, to the earth that would have allowed them to evoke metaphors of rape and violation. To imagine the earth as a woman to be taken over, consumed, dominated was a way of thinking about life peculiar to the colonizer.²¹

Centuries before the colonist arrived at our shore, rape had been condoned in earlier colonial conquests. The thoughts of the Spanish colonists, prior to their 'penetration' of the Americas are captured in this following quote:

Never again may mortal men hope to recapture the amazement, the wonder, the delight of those October days in 1492, when the new world gracefully yielded her virginity to the conquering Castilians.²²

In the rape of ruwe, the mother becomes a mere object of their desire. Further evidence of their intentions to transform the mother at the time of early colonial settlement of South Australia, is reflected in the following quote:

As with the aborigines so with the land, the heathen uncivilised aborigine was but the human manifestation, even product, some would have suggested of an

²¹ hooks, bell, 1994: 203.

undomesticated and wild landscape. The tracts of wilderness in SA possessed not actual but only potential value. And would remain in that state of waste until labour, capital and enterprise were applied to them,.....(and to be) rescued from a state of nature! Like the Aborigines the land had to be saved from being raw, untamed and natural, it had to be civilised, subdued.²³

Two centuries later we are left to live with the results of their rape, they raped all things in our natural world. Their rape violated our laws, of love of the land and respect for all things that co-exist in our natural world. The rape of ruwe is now so widespread, globally its impact is reflected in the destruction of indigenous societies and culture. The balance of global identifications is becoming increasingly non-indigenous, the empty shell of humanity. Becoming the collective identity of the giant frog. Devouring all from the natural world.

And I ask myself, when did they stop loving the mother? Why did they begin this suicidal attempt to destroy all life forms, and for what purpose? I don't know if there is a point where it all began, but to ask these questions assists me in thinking about what it was that triggered the desire to transform, to rape the land, the mother. Did the rape begin when the laws became covered over, when the ceremonies and the songs that revered the mother stopped being sung? And when the reverence was lost to them, did it birth the desire of 'man': ".. man's desire for the lost womb. With God the Father substituting for the return to and into the mother which can never take

²² Historical account was recorded by Eliot Morison, cited in hooks, bell, 1994: 203.

²³ Williams, M, 1974: 15. Nungas didn't garden. Mainland cultures saw gardening cultures as supporting an inferior means of livelihood and a desecration of the mother. Gardening itself leads to a simplification of the ecosystem. The wisdom of Nunga cultures could foresee the consequences of gardening and conscious decisions were made not to. There was a confidence that maintaining diversity, travelling for knowledge, hunting, gathering, firing, and maintaining ceremonial obligations is 'best practice'.

place!”²⁴ Was the search for the return to the mother substituted with the rape of her? Is this what happened? I think the rape began with the loss of song law, and ceremony. And in a state of loss and trauma they rape, and dominant in their loss or desire are falsely fulfilled.

This is why law and ceremonial life of Aboriginal cultures is important, because it restores balance through its teaching of the reverence for the mother. It is the medicine the old people have always known of. The medicine that will make whole again a humanity that is one with the land. In the story of the giant frog the animals made the frog laugh to release the water. In understanding the frog’s trauma we find the way to heal and to make the medicine of laughter. We need to find the medicine to heal the rape. And yet we have it, the old people hold it in the law and ceremony. The many non-indigenous need to become Aboriginal again. But to become Aboriginal in their place and in their culture, not ours. To be Aboriginal is to adhere to the laws and cultures that emanate from the place and from the time of Kaldowinyeri. For the non-indigenous to become Aboriginal, the first step is to stop their participation in the colonisation and genocidal processes and return to the land of their ancestors. While it is understood that the physical return by all non-indigenous to the place of their Aboriginality is impossible to achieve the return can be done in other ways. Where the physical return is not possible the return may begin with a return of the Aboriginal soul life. But this can only be achieved when the individual adheres to the Nunga laws of place and by entering into the law of place in a way that is ‘proper’. The non-indigenous needs to become the indigenous and enter into the process of decolonisation. In the words of Ward Churchill and others during a speaking tour of Germany:

²⁴ Irigaray, Luce, 1993 b:68.

We are not unique in being indigenous people. *Everyone* is indigenous somewhere. *You* are indigenous here. You, no more than we, are landless; your land is occupied by an alien force, just like ours. You, just like us, have an overriding obligation to liberate your homeland. You, no less than we, have models in your own traditions upon which to base your alternatives to the social, political, and economic structures now imposed upon you. It is your responsibility to put yourselves in direct communication with these traditions, just as it is our responsibility to remain in contact with ours. We cannot fulfil this responsibility for you any more than you can fulfil ours for us.²⁵

To copy the Aboriginality of us would perpetuate the rape and appropriation but to regain the loss of Aboriginality is the re-learning of reverence for the ruwe, and its laws. This is a first step in healing the wounds of rape.

I see the rape of women mirrored in the rape of ruwe. The violation of the mother takes shape in all forms and the muldarbi that does this is the same one. The coloniser coming to this country raped on all levels - land, women and children. What was done to the ruwe was done to people; we discovered another way of being one with the land. We now need to re-discover the old way of being one with the land.

²⁵ Churchill, Ward, 1994:236.

6.4 Women's law

What is more important, woman or man's law? I have been frequently asked this question. The answer is that they are both essential to the other. They are integral and indispensable to the inherent unity and fabric of creation. The law of Aboriginal women is Kaldowinyeri, from time immemorial. Indigenous women have always known, lived and realised from the beginning women's law. And despite the weight of the muldarbi Nunga women still keep the law, as do the men theirs. The two following quotes are from senior law women, the women of Borroloola speak of the law:

We are Aboriginal women. We talk for our hunting business, ceremony business. We used to go hunting, we can't wait for the men. We are ladies, we go hunting and feed the men too. Men never used to boss over the women. We are bosses ourselves, women ourselves. Sometime man use to work for woman too when we come back from hunting, tired and everything and husband to work for us. We still have ceremonies these days for young boys, like that little boy there, and women dance with that old people only, but then everybody see us too. And we having other ceremony our own with the woman herself, that important, nobody see, only djunkai can stay there to watch, old man. He look, and he off again. When we have the big ceremony business and we can't see men.²⁶

Senior law women Tjama Napanangka for the Ngardi-Kukatja people, discusses women's law for her country:

Women's culture, yawulyu, really strong. I bin learn culture from my granny, from mother, in Old Balgo, when I bin young. I bin watch womens. All bin doing painting. Doing dancing. Teach 'em all young girls. Some young girl, they frighten. It's really hard, this culture, for the women. Sometimes they grab' em, with the little boys, they start doing painting, dancing, with mother and aunty. Father they separate. I know culture now. I big enough. 'Hey, you woman now. You want to come to culture, learning, dancing?', all bin say old people. 'Oh, yeah!" Right. Old people bin take me bush for teaching. Do 'em painting. And do 'em dancing. After finish in culture, we can go hunting for goanna. We bin kill 'em goanna, present for old ladies. When I bin young, we bin com to (New) Balgo, old womens bin do dancing, bin share 'em *Tjipari*, and *Mina Mina*, and *Nakarra Nakarra* – every culture. We bin dancing and learning. We bin have big ceremony. Singing. All the mothers, for the son. Only the women. And old people they come and get tucker for the mens. And soon as they ready mens come. The people they talking, 'All the mothers, they ready?' 'Ye.' The mother they paint up, they ready. That woman side. We sit down all night. All the man, old people, they come. We put 'em smoke – all the mothers. We bin have a ceremony all the time. Separate from mens.

Women bin grow up with *yawulyu*, women's culture. They say, 'This culture, for women's side, it's from *Tjukurrpa*, Dreaming. That's why we got to hold on this culture. We can't leave 'em. We gotta keep 'em for kid. Still teach 'em. What about grand-daughter?' That's why we hold 'em. And man, old people, they learn from woman side. They learn. They understand. Woman

²⁶ Borroloola women speak, in Gale, Fay, 1983:71.

take it really hard and hard. Strong, really strong, more than man. If anyone gets sick from fighting they get 'em red ochre. Whatever, they put em red ochre. Old days, no medicine, only ochre. And this time , doctor do 'em in hospital, they bin fix quick. They get up and walk, is right. That's why we keep this culture really strong. We hold 'em really strong. Land and culture. Whatever bird, animal he's culture too. Turkey, he's culture, goanna, anything. Whatever. Bush tucker is culture too. Strong culture.²⁷

Indigenous peoples law ways now subverted by the muldarbi have challenged the lawful place of our women. Men have now replaced our lawful role in many indigenous cultures. It is the white man who made the first contact with our communities, and so it was the Nunga men who were sent to deal with them. And as the coloniser imposed their ways they also imposed their way of treating women. Lavina White talks of the coming of the white man to the Haida and the eroding influence it had on their matriarchal culture:

The European way had taken over and there were only men to make the decisions. And as a consequence, I faced a great deal of pain. The decision-making by matriarchs has been left long ago. Now I see young women in the movement and I am thankful that I wouldn't give up when I was the only one for so many years. We need a balance in decision-making in this world. ...Decisions must be made by both male and female, otherwise there is imbalance. And the only ones that can reach areas of decision-making are

²⁷ Cited in De Ishtar, Zohl, 1994:144.

those that act like men, and so the balance never comes into play. Women are not allowed to act and think like women, for if you do, you are not valued.²⁸

Nunga miminis' law comes out of Kaldowinyeri: always was, always will be. We come from a place of law, a space and horizon that was always women. In terms of women's law there is nothing to be discovered that has not always been known to our old people. It is useful for me here to distinguish the work of MacKinnon; her writings are not about a discovery of women's law, they are a response to the void and rape of women's law. MacKinnon writes from within the patriarchal horizon, like the sister who got left behind, in the place of men, while the other sisters continued their journey as they had always done. However now, following centuries of rape, there is a long trek in the journey to rediscover women's law for the sister who got left behind. MacKinnon speaks of a way out of the despair as being a journey into uncharted waters. But the trek is not as difficult as she would have us believe, for the waters have always been known to the indigenous world. There is nothing to be discovered by Nunga miminis that they have not always known. The journey is for our sister who got left behind. MacKinnon herself said maybe white women have no songs, and perhaps the only song she can now sing is of feminism in the struggle to be. But as I write, the songs of Nunga miminis are also quietening as the horizon of patriarchy²⁹ spreads to encompass all. The songs need to be sung for they are the medicine which will dissolve the muldarbi.

The Seven Sisters travelled in all directions across the country, giving to the women their laws and ceremonies of ruwe. These are laws and ceremonies that I have no

²⁸ White, Lavina, FNICJ Transcript Vol 11, 1996:96.

²⁹ Patriarchy is structured and justified by values that emphasise male dominance over women and nature, patriarchal societies reward men and male dominant behaviours with positions of power.

permission to describe, and even if I did, would be difficult to describe them into an academic context as their processes are not simply intellectual ones. The law and ceremonies are spiritual. They involve serious business which carries with it onerous obligations. These obligations are to ensure the continuity of law and ruwe, and that the law is handed on for the future of all humanity. The law cannot be freely spoken of because many of its aspects are sacred and secret. Communicating the law is not simply a process of telling a story. There are laws that guide us in the communication of law. The traditional boss for a story may decide to sanction or not to sanction the teaching of law. Law travels across the country, and unlike most stories the law has no beginning or end. Communication of law is complex, a process of negotiation between 'bosses' who hold the law as it crosses into their country. When one is given the opportunity to respect and honour the law, one then begins to know the law of ruwe and that of itself takes on a dimension which is Aboriginal. In coming to learn and to know the law one takes on the obligations of law and ruwe.

The laws of women travel the ruwe, in the following quote I have taken from Deborah Bird Rose she discusses the idea of a gendered ruwe:

Dreamings travelled; they were sometimes in human form, and sometimes in animal or other form. But whatever the form they were almost inevitably either male or female. Dreaming men and women sometimes walked separately and thus created gendered places. There are now women's places and men's places: places which are associated with one or the other because Dreaming made it that way. There are varying degrees of exclusion: places where men can go but must be quiet, places where they can look but not stare, where they can walk but not camp, and then there are places where men

cannot go at all, ever. There are places where men cannot drink the water, cannot even look at the smoke that rises from women's country. And of course the same is also true with respect to men's places, men's country.³⁰

The process for Nunga miminis in re-empowering woman's law is the struggle to reclaim places that are the domain of both Nunga and woman. In this struggle for the law, the sister who is left behind searches for the track made by the grandmothers. The track is one which gives voice to Nungas: sovereignty of place, voice to land, voice to law. The question is: do the people have the will to go down this track and are they prepared to begin the work of clearing it of the muldarbi?

MacKinnon has worked to clear a space for women and in her attempt to create a feminist theory of the state she argued:

...feminism stands in relation to marxism as marxism does to classical political economy: its final conclusion and ultimate critique,... In a dual motion, feminism turns marxism inside out and on its head.³¹

But where does the indigenous situate? Will the indigenous become to feminism what feminism is to marxism, and do we have time to play this one out, to see it turn feminism on its head also? Or is it that we must move quickly (as I think we must) to a place of indigenous being, to a way of life which we know holds the key to the future. A place that has always been.³²

³⁰ Bird-Rose, Deborah, cited in Langton, M, 1997:90.

³¹ MacKinnon, Catharine, 1989:125.

6.5 Seeing my woman is not a white one

Why do we struggle with sisters, are we not sisters in the struggle against white male domination? As I see it the problem is that white women have always played a role in the sea of white racism we struggle against, they are also the muldarbi that came and colonised our lands. It has been said by indigenous women many times before, 'we are not the same.' We have a different history, a different story.

Many women will find they are on the same raft of male domination, but how we got there differs. And it is the different stories which are important. Because not all women reached the raft or the shore safely. Many drowned and the majority are still drowning, many are hanging on, or standing up, not all are seated comfortably. We need to tell our stories collectively, all voices need to be heard. You cannot disregard the difference in an attempt to establish a universal experience or truth, because racism is still staring us in the face, threatening to choke the life force from our being, and our children's beings. We know who gets thrown off the raft first when it starts to sink.

MacKinnon talks of feminism's search for a ground being a search for the truth of all women's collectivity while acknowledging the different stories. I agree with this, but the next step or question is how do we dissolve the muldarbi as a collective, particularly when we as indigenous women and women of colour are still looking at the muldarbi in white women. Do we all jump off the raft together in this new found collectivity, or do white women continue to float in a sea of white racism, to the

³² Churchill, Ward, 1994:232, has also expressed this point to groups frustrated with seeking models for change, where he also argues that '...a functional alternative exists, and has always existed'.

shores of the muldarbi as they have always done before? Or do we re-discover the medicine that will heal this sea of white racism?

There is considerable testimony from indigenous women and women of colour of their experiences in coming to establish the collective sisterhood. There are stories of our continuous struggle with race and class in the midst of feminist theory.³³ There are stories also of competition and distrust between women. hooks suggests to us, 'If that will to compete is replaced with a longing to know one another, a context for bonding can emerge.'³⁴ And perhaps when this context for bonding emerges the space to listen to the stories of racism will also emerge. Because if the failure to listen continues, it is as Audre Lorde has said; 'To deal with one without even alluding to the other is to distort our commonality as well as our difference. For then beyond sisterhood is still racism.'³⁵

The film *the Tango Lesson* by Sally Potter,³⁶ is a story about a film-maker who becomes obsessed with the tango or the male tango dancer. It is hard to tell which one, or if it is an obsession with both desires. Is it a journey into the exotic world of the tango, the 'other'? As the film-maker develops her skills at dancing the tango, she becomes the partner of the male tango dancer. In becoming his dance partner she has taken the place of the woman of colour, (South American), his previous dance partner and lover. With Potter's journey into the land of tango the questions are asked by myself and my daughter as we labour to stay with her journey: what is this story, is it a competition of best dancer or best fuck, or is it Potter's journey for identity? When the quest is finished the women of colour, the culture of colour, and the tango dance,

³³ hooks, bell, and West, Cornell, 1991: 106.

³⁴ hooks, bell, 1995: 223.

³⁵ Lorde, Audre, 1984: 70.

are consumed. Potter becomes the tango dancer supreme.³⁷ So powerful is she, that she dominates the tango dancer. A victory to feminism? Is it the domination of the stereo-typical macho culture of Buenos Aires. In Potter's quest women of colour are invisible, one woman only - Potter, takes on the men of tango, as they dance and twirl her across the screen, a film screen that she as film director, and script writer dominates. In her whiteness Potter takes the tango to another level, one not ever known before, other than in the imaginings of those dreaming of such a journey. So, what does Potter's film do for the bonding of women of colour and white women? Is she our hero? Does she carry some white women's magic that is capable of killing the macho muldarbi? It's Potter's story, and it is one that left me feeling uneasy. How could I relate to a woman of such power, someone who can consume the culture of the other and in doing so become so powerful that she is able to subvert the culture make it clean and pure for the white feminist terrain? Or does it, as I think it does, keep the competition between us and them going?

Racism and sexism are not the same experiences.³⁸ The white woman has sat as a muldarbi, we have not forgotten her as a dominator of blackness. She cooked bread which was poisoned with strychnine; it killed the black women and children that her husband had preferred sexually, and when the coloured offspring, the result of rape were born, to hide their shame she participated in the removal of black babies from their mothers. Children were taken away, far away from their mother's law, language and culture. The white woman watched white men play polo with the heads of young

³⁶ The *Tango Lesson* was written and directed by Sally Potter, and released in Australia during 1998.

³⁷ I have discussed this issue the consuming of the culture of another, above in chapter 4 in greater detail. I raise it again here to illustrate specific sites where it arises in regard to relationships specific to women.

³⁸ For Nunga miminis they reinforce each other to create a double barrel effect, further discussion see Pettman 1992:27, The violence and maleness of the frontier was a ratio of 38 white men to 1 white women, the impact on Nunga miminis is obvious, we become the spoils of colonialism along with the

black babies, and did nothing to intervene. Her influence to change this terror was not felt as it still is not felt today.

Black woman
black grandmother
why do you frown
in this golden sunshine
your skin warm velvet brown
somehow causes pain
your children cry again
not welcome on their doorstep
not wanted in the town

Black woman
black mother
when you walk down the street
everybody notices
but no one dares to greet
your face is very different
from the face on our TV
no one looks into your eyes
for fear that they may see
Black woman
black children
black mother
and see a mother's scorn
for those who cannot love the land
the mother
the first born.³⁹

6.6 And when white women struggle for equality I have to ask: equal to what?

Legal subjects were once simply male. Women have gradually been granted subject status, and attempts have been made to back up this formal status with equality.⁴⁰

land and its natural resources. They ate and plundered us equally. See Broome 1982:38, and Pettman 1992:26.

³⁹ Gilbert, Kevin, 1990:4.

MacKinnon writes, 'The white man's meaning of equality is being equal to him which is the same as being the same as him.'⁴¹ If the measure is a man, and we were measured equal would it dissolve the muldarbi? Of course not. The muldarbi has many faces, only one of them being dominant male. The other muldarbi forms are there still waiting to be peeled away. I have heard comments from Aboriginal women throughout the world telling their stories on how they had no desire to be equal to a man, and that it is the men who are not yet our equals. The issue of equality is better measured against ourselves as women.⁴² Irigaray expands this point further in the following quote:

...claiming to be equal to a man is a serious ethical mistake because by so doing woman contributes to the erasure of natural and spiritual reality in an abstract universal that serves only one master death.⁴³

The indigenous women attending the Fourth World Conference of Women 1995, in Beijing, produced a paper '*Gender equity vs. Self-determination*', in which they argued for a global strategy of the women's movement to be in terms of self-determination of women, in preference to gender equity. Self-determination is an inclusive concept, incorporating the right of women to determine their political status, and economic and social development. Gender equity however, is a narrow concept focused on sex-based discrimination, and one which is manipulated by nation states, avoiding issues of racial, environmental, civil, political and cultural inequities. At the Beijing conference indigenous women argued that the empowerment of women could only be realised within the context of self-determination, and that the struggle for 'gender equity' occurs outside of the context of decolonisation, resulting in the

⁴⁰ Davies, M, 1997:35.

⁴¹ MacKinnon, Catharine, 1987:65.

⁴² Irigaray, Luce, 1993 b:12.

preclusion of indigenous women. They concluded that gender equity could only be achieved within an anti-colonial and anti-imperialist framework. The struggle for gender equity illustrates one way in which feminism is contained by the male horizon. To frame the struggle in terms of gender equity, leaves an entire realm of life unaccounted for. The struggle to be Nunga is far - reaching, exploding the boundaries of a male horizon. In the context of being Aboriginal and all that which it encompasses it is a mistake to base our claim on being equal to a man or a white woman (who seeks to be equal to a man). To do so would be to participate in a process that works to erase, or extinguish who we are as Nungas, and lead us along a path to become one of them, a path we know leads to the death of all things.

The problem posed for Nungas when the voice of pragmatism⁴⁴ and the equality of rights talk dominates the struggle for ruwe, is that this voice of equality frames our Nunga relationships to law and land. The relationship is then perceived to be the same as the coloniser's relationship to land and law, a property right, one which can be reduced to a mere economy, which is rationalised in and out of existence. But our relationship to ruwe is much more, it is not for sale and it cannot be extinguished. The construction of native title by the Australian state is a muldarbi, it is a

⁴³ Irigaray, Luce, 1996: 27.

⁴⁴ The 'Aboriginal leadership' speaks the voice of pragmatism. Aboriginal 'leaders' is a concept that has been popularised by governments for their purposes to assist in negotiations. It is much easier to talk with a small number of 'friendly natives' than it is to, as Nunga protocol would require, sit and talk to the whole 'mob' until the issue is understood and a consensus has been reached. This latter idea of negotiations is one Nungas dream of from a time before Cook. By creating an 'Aboriginal leadership' the government is able to push through deals with 'leaders' placed in the onerous position of seeking agreement amongst the 'mob'. This process is alien to our way of life. But governments are reluctant to follow Aboriginal protocols and talk to the traditional owners and their families, preferring a quicker, easier, less costly process to settle a deal. The Australian media has been complicit in the creation of an 'Aboriginal leadership' and this occurred in the negotiations for the *Native Title Act 1993*. In that process individuals were elevated to almost guru status. Some of the 'leaders' were displayed by the media as possible candidates for appointment as the head of State of a new 'Australian Republic'. A small group of 'Aboriginal leaders' representing Aboriginal Land Councils, ATSIC, and a number of Aboriginal Legal Services and organisations, negotiated the *Native Title Act 1993* with the Australian government.

smokescreen which has taken us away from the important business of taking care of country.

MacKinnon asks of us important questions in the following quote:

..the final issue is not whether biological males or females hold positions of power, although women must be there. The issue is: what are our identifications? What are our loyalties? To whom are we accountable?⁴⁵

They are important questions; identifications, loyalties and accountability. Whom are we really accountable to? And this thought takes me to think about the land our mother and for me the answer comes easily: we are accountable to laws of creation as we draw each breath of life.⁴⁶

6.7 The muldarbi has many faces

Living with the muldarbi is living with many things, many levels, many experiences; it has many faces. Male domination is just one of them. Male domination was not *our* regime as is suggested by MacKinnon, it was not part of our beginnings, it was imposed. The number one muldarbi is 'an entire structure of domination of which patriarchy is one point.'⁴⁷

⁴⁵ MacKinnon, Catharine, 1987:26.

⁴⁶ See Gilbert, Kevin, and Williams, Ellie, 1996, for further poetry and discussions on the meaning of who we are accountable to, from a sovereign Koori perspective.

⁴⁷ hooks, bell, 1989: 25.

Male power is systemic, that is the truth.⁴⁸ This is found also in communities where indigenous peoples have been dispossessed from the land and law. There are however still enclaves where there are surviving indigenous communities and where the muldarbi has not yet taken complete control, and in these places male power does not dominate. bell hooks illustrates how the muldarbi lives within feminism, and how this muldarbi continues to impose its way of knowing upon indigenous peoples in the following quote:

To speculate that an oppositional division between men and women existed in early human communities is to impose on the past, or those non-white groups, a world view that fits all too neatly within contemporary feminist paradigms that name man as the enemy and woman as the victim.⁴⁹

To generalise as MacKinnon has, in saying male dominance has always existed in all cultures is to deny the stories of Nungas. Male domination does exist today in some indigenous communities where colonialism has had the greatest impact and not where indigenous peoples still live and maintain indigenous values and ways of life. It is these other stories which need to be given a greater voice because it is this other voice which will become the vision or the indigenous horizon, and ultimately the medicine for dissolving the muldarbi.

The muldarbi colonialism has a contemporary face which is almost invisible, quietly sucking the lifeblood from the land and its peoples in the 'mythical' tradition of the vampires of Europe. The muldarbi-colonialism has survived for centuries, always finding contemporary forms in which to embody itself. Colonialism once was

⁴⁸ See MacKinnon, Catharine, 1989:170 and 158-159 for further discussion on what is a very broad sweeping statement, but is a well known fact.

⁴⁹ hooks, bell, 1989: 20.

popularised and seen as good, bringing christianity and civilisation to the world of Nungas, today this fraud is still manufactured. As in past history it claims legitimacy by popularising itself. Its contemporary form is different.

The muldarbi is a wearer of masks, worn to disguise its intentions. The muldarbi is disguised in a popular form. Popularity is important to the survival of the muldarbi as it increases its potency. By being popular the muldarbi's evil intention remains hidden, it becomes invisible. It goes unnoticed as it drains the lifeblood from the land and peoples, its crime goes undetected. The popular muldarbi creates the illusion that there is a general well-being in the lands of the colonised, all is equal and fair. This thinking provides the muldarbi with a blank cheque to continue silently, killing invisibly, in the background.

One contemporary muldarbi is the construction of native title.⁵⁰ Native title is 'known' as a remedy which will 'save' Nungas from further trauma. But native title will not end the trauma; other than in the imaginings of the colonist and the colonised who have fallen in love with the fantasy that now, post-*Mabo*, all has changed. Native title is 'known' to recognise minimal property rights to land and law. But our old people did not describe the land or who we were as 'native title' or any other form of title. We had bosses for country and they held the onerous responsibility for caring and sharing of their ruwe. The relationship to land held a balance between caring for land and the sharing with land for sustaining life. The law held the balance. The concept of native title is different, there is no balance between the care of and share of

⁵⁰ A myth which has been peddled and popularised, since its pronouncement by the High Court in the *Mabo No 2* decision. I have discussed in chapters 3, 4 and 5 that terra nullius still has a life, it has embodied itself in new forms, for example extinguishment, negotiated agreements with trans-national corporations, and agreements which will impact upon the future survival of Nunga culture and law.

the land. Nor is there any recompense for past and continuing acts of dispossession and genocide.⁵¹

Why is Native Title a muldarbi? Because it has shifted people's attention away from the principles which underpin our traditional and cultural relationship to land. The *NTA 1993*⁵² validates the rape of our ruwe, the principle of extinguishment introduced by the decision in *Mabo No2* and now enshrined in the *NTA 1993*,⁵³ violates our laws of creation, as the law and our relationship to it cannot be extinguished. Similar initiatives in North America, for example the 1946 *Indian Claims Commission*,⁵⁴ have also been useful tools in the dispossession of indigenous peoples of their lands. The following analysis is by Vine Deloria Jnr.:

Since many large areas of land had not been formerly or formally ceded by the Indian nation, the effect of the work of the Indian Claims Commission was to retroactively transfer title to large tracts of land owned by the Indians to the United States by using the fictional device which asserted that the lands had been permanently lost. Deprived of the right to sue for title to their lands, the Indian nations were simply stripped of their legal rights for a pittance.⁵⁵

⁵¹ The muldarbi is slowly being exposed. A media report by Natalie O'Brien on the 1st January 1999 in the Sydney Morning Herald reported: The outgoing head of the National Native Title Tribunal, Justice Robert French, criticised governments for focusing on political debate instead of dispelling public myths and fears about the claim process. In particular, governments had been largely ineffective in dispelling fears that claims could be made over freehold backyards. Another report by Journalist Tony Stephens; 29/12/98, reported Robert French as making the following comment; "The pastoralist didn't understand the fuss over native title. He said he was happy for Aboriginal people to enter his property for legitimate purposes as long as they asked and said: "Thanks, boss." "Maybe they're tired of calling you boss," the judge said. The judge said governments going back to 1993 had failed to inform and educate Australians properly about native title. This failure had led to critics promoting confusion and anxiety about native title and to the sort of belief expressed by the pastoralist.

⁵² This position is further entrenched through the *Native Title Amendment Act of 1998*.

⁵³ An example of native title being extinguished by the 'tide of history' is found in the recent Federal Court decision, *The Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Ors*, (1998).

⁵⁴ *An Act to Create an Indian Claims Commission*, Ch. 959, 60 Stat. 1049 (1946) at 1050.

Nungas are left with the option, under the *NTA 1993*, to negotiate agreements with trans-national corporations or other groups with an interest in our traditional ruwe. These agreements will frequently violate our laws, rather than instil the idea of caring and sharing, drawing Nungas further away from the laws of caring and sharing for country. With the validation of Anglo-Australian title, the extinguishment of native title, and the ominous option of negotiating with trans-national corporations, the stakes against the survival of Nungas are rising.

Many Nungas placed hope in the native title process believing that even though the recognition of native title wasn't much it was better than nothing. It was in this humble hope for something better that the Yorta Yorta people were quickly catapulted back into the reality of genocide.⁵⁶ The decision of Olney J adopted a frozen view of Koori culture and law and was critical of the oral history given in evidence by members of the Yorta Yorta; the judge preferred the views of the pastoralist Curr who settled on the lands of the Yorta Yorta in the 1840s. In his judgement Olney J concluded that there was no evidence of law and culture surviving beyond the 1880's and therefore there was no continuity of the culture and law of the Yorta Yorta people. The Yorta Yorta lodged an appeal to the Full Court of the Federal Court on the 28th January 1999 against the decision of Olney J. In the appeal documents, they argue that Olney J applied an incorrect test to decide whether native title existed.

The illusion of the recognition of indigenous rights has created a potency which allows victims, caught unaware, to be more easily drained of their lifeblood. The mainstream is persuaded to believe that native title will put life back into the land and the people, but it will not. It is a deception that will work to the opposite effect.

⁵⁵ Deloria, Vine, Jr. cited in Schulte,-Tenckoff, I, 1998:259.

Native title is a muldarbi because it does not free me to be who I am. It is the killer of law. It continues to dispossess me of the cycles of my being. It is the muldarbi which will legalise the further rape of my 'mother', my ruwe and legalise the continuing genocide. The muldarbi, undetected, hides behind the mask of popularity.

Many believe that this muldarbi is here to protect us. But how can we be protected by a muldarbi which subjugates us? Why is it that there are those amongst us who continue to try gaining protection and the recognition of rights from the muldarbi which continues to oppress us? Why do they not go outside and reclaim Kaldowinyeri that is ours and that has always been? Is it fear that stops them?

An oppressed group must at once shatter the self-reflecting world, which encircles it, and, at the same time, project its own image onto history. In order to discover its own identity as distinct from that of the oppressor, it has to become visible to itself. All revolutionary movements create their own way of seeing.⁵⁷

In writing of the muldarbi I have attempted to expose its identity. It is like a process of exorcism, one which has cleared the path on the journey to self-healing, a journey which seeks to decolonise and reclaim the Nunga.

⁵⁶ See chapter 5 for discussion on the Yorta Yorta decision.

6.8 Seeking protection from the muldarbi

The following quote by MacKinnon speaks of a range of other situations beyond feminism:

But male supremacy is a protection racket. It keeps you dependent on the very people who brutalize you so you will keep needing their protection. Feminists know that protection produces the need for more protection and no rights of your own.⁵⁸

The idea of seeking protection from the muldarbi which can only produce a further need for protection, is endemic in the relationship of Nungas to the colonial state. Historically legislative protection was located in the early colonial *States Aborigines Acts*; it was enacted for the (popularised) purpose of saving ‘aborigines’ from the frontier violence and sexuality of settlers. A more recent example is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984, (Cth)*; its popular purpose was defined as being for ‘the preservation and protection from injury or desecration of areas that are of particular significance to Aboriginals in accordance with Aboriginal tradition’. The legislation was enacted to ‘protect’ sites of Aboriginal cultural significance.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984, (Cth) was used to provide interim protection for a period of 25 years from the building of a bridge to Kumarangk. However in the other hand the commonwealth government enacted the *Bridge Act 1997, (Cth)*⁵⁹ permitting the building of the bridge to

⁵⁷ Rowbotham, Sheila, cited in Mackinnon, Catharine, 1989: 84.

⁵⁸ MacKinnon, Catharine, 1987: 31.

⁵⁹ The *Hindmarsh Island Bridge Act 1997 (Cth)* amended the *Aboriginal Heritage Act 1984 (Cth)*.

Kumarangk. And the High Court in *Kartinyeri*⁶⁰ held the *Bridge Act 1997* to be a valid 'indirect express amendment' of the *Aboriginal Heritage Act 1984*. The *Bridge Act* provides :s 3,

- (1) The Heritage Protection Act does not authorise the making of a Declaration in relation to the preservation or protection of an area or object from any of the following activities:
 - (a) the construction of a bridge, and associated works (including approaches to the bridge), in the Hindmarsh Island bridge area;
 - (b) work or other activities in that area preparatory to, or associated with, that construction;
 - (c) maintenance on, or repairs to, the bridge and associated works,
 - (d) use of the bridge and associated works
 - (e) the removal of materials from, or dumping of materials in. the pit area in connection with any of the activities mentioned in paragraphs (a) (b) and (c)
- (2) the Heritage Protection Act does not authorise the minister to take any action after the commencement of this Act in relation to an application (whether made before or after the commencement of this Act) that relates (wholly or partly) to activity covered by paragraph (1)(a), (b), (c), (d) or (e)

Section 4(1) of the *Bridge Act* denies the Minister the authority to make an appointment of a person to report under s10 of the *Heritage Protection Act* where the application relates to an area within the Hindmarsh Island Bridge area and seeks a declaration that would prohibit or restrict any of the activities specified in sub-pars (a), (b) (c) (d) or (e).

⁶⁰ *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722.

The *Native Title Act, 1993 (Cth)* and the *Native Title Amendment Act of 1998 (Cth)* are further examples, of protection or recognition in one hand and violation and theft in the other. The *NTA 1993* recognises and validates the title of the coloniser, while it also 'recognises' a native title 'right'. A native title right must be registered and then established through the Native Title Tribunal and Federal Court processes.⁶¹ The native title 'right' struggles for recognition under the duress of the claimants who work against the pressure of multi-nationals and other interest groups, but also competing native title claims. Moreover, if the native title is recognised it is still vulnerable to extinguishment.

And in that process of seeking protection many have taken shelter in pragmatism. As MacKinnon also says: 'practical means something that can be done while keeping everything else the same.'⁶² So while the pragmatists who have negotiated native title on behalf of the traditional owners throughout Australia, not only assisted in the erasure of the voices of traditional owners, they also changed nothing within the horizon of the muldarbi.⁶³

⁶¹ There should have been a Tribunal process that called for the claim of title to land held through the processes of colonialism to be proven. Like when your land is trespassed upon the onus of proof lay with the trespasser.

⁶² MacKinnon, Catharine, 1987: 70.

⁶³ Noel Pearson a leading Aboriginal pragmatist, said he was: 'Excited by what Professor Richard Bartlett described, accurately if inelegantly, as the 'pragmatic compromise' of Mabo – a compromise between the fact of the original right of the indigenous people to their homelands, and the historical accumulation of rights by the colonists – I am of course acutely aware that not all of the developments of the common law of native title in Australia will give our side joy.', in Yunupingu 1997:151, it is becoming clearer now that in the mud settling there is no joy.

6.9 A guide to steering clear of the muldarbi

To survive the Muldarbi, I look to the time of the first sunrise, and the stories that emanate from place. The Devil Dingo is one story. A time when this big dog hunted, with the old woman. The dog hunted and found young men for her to eat. Her hunger was insatiable, and in the end to stop them the old woman was turned into an insect and the dog was made into two dogs no longer monstrous and dominating, but living harmoniously with all other life. We have to be able to do this again and re-find the way of settling the muldarbi down.

Irigaray spoke of the messenger coming:

To take up only the most beautiful, as yet to be made manifest in the realm of time and space, there are angels. These messengers who never remain enclosed in a place, who are also never immobile. Between God as the perfectly immortal.. Angels destroy the monstrous that which hampers the possibility of a new age; they come to herald the arrival of a new birth, a new morning.. ...A sexual or carnal ethics would require that both angel and body be found together. This is a world that must be constructed or reconstructed. A genesis of love between the sexes has yet to come about in all dimensions, from the smallest to the greatest, from the most intimate to the most political. A world that must be created or re-created so that man and woman may once again or at least live together, meet, and sometimes inhabit the same place.⁶⁴

But there is more. Once that occurs all of humanity must then transform itself so that it is able to co-exist in harmony with all other life forms. Humanity is just one small

part of it. Maybe we are waiting for the birko mankolankola,⁶⁵ the messenger who brings us the song and the ceremony.

⁶⁴Irigaray, Luce, 1993 a:15, 17.

⁶⁵ A Kaurna word for messenger.

INDIGENOUS WAYS OF BEING A FUTURE

'Earth Summit'

When we speak of 'environment'
we talk of ourselves
when we talk of Mother Earth
we speak of Father Ocean
when we talk of the oceans, the rivers
and the sea
we speak about our own living waters
within us and our blood
when we speak about the land
we speak about our bodies, our feet
our wholeness, our hands
when we speak about the universe, the clouds
and the sky
we speak about our thoughts, our dreams,
our being
when we speak about the sun
we speak about the light and warmth of life,
the golden cup from which we all sip
and which, if we block it out or
destroy the vital shield,
will ensure that, equally,
as we now live we will,
as equally, all die -
when we attack and exploit one
we attack and exploit ourselves
and all creation.¹

¹ Gilbert, Kevin, 1996:40

7.1 A Circle of Difference

Survival is no longer exclusively a question for Nungas, it is a question for all humanity, of how human beings will co-exist with each other and the natural world. Global colonialism has destroyed the indigenous relationships to the natural world. Most of the Aboriginal nations of Australia have no land base, and live within cities, suburbs, and country towns. The Kaurna people, while they have no land of which they remain in possession, still hold the song of Tjirbruki for their country. Many of the places of the song have been built upon or mined and are now damaged lands. Even the resting place of Tjirbruki was open-cut mined during the 1950s, 1960's and 1970s. But it remains a law that lives in the land, still breathing beneath the layers of damage done, deep within the earth.

This is our land. Beneath is the Dreaming that will never be taken away. We feel that it is our Dreaming and that it is our land and we are part of it. Never will any part of it be taken away from the knowledge that we feel - that this land is beneath the Dreaming and it is our land that we are sitting on.²

There is a connection between colonisation and the destruction of our lands. The damage done to our land followed the trail of colonial settlement. The work before us is expressed by Haida elder Lavina White as being the bringing to an end of the 'colonial mind set' and she argues that it is indigenous peoples globally who carry a

² Evidence of Banjo, before the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act*, Tuesday 13 April 1999, at Kalkarindji, p294. The Reeves Report recommended the *Northern Territory Land Rights Act*, be amended. The amendments proposed would alter the structure of the Aboriginal Land Councils, modify the mining provisions of the Act, and alter the operations of the Aboriginals Benefit Reserve, including the distribution of monies.

responsibility to bring that about.³ The renouncing of the colonised self could become the renewal of the human relationship to mother earth and the greater cosmos, the relationship which our old people have never abandoned. It is, as Ward Churchill has argued so well, now a question for all peoples to redefine who it is they are, and come to a place of their own indigenous understandings.⁴ Those who now call us the 'other' need to know that there is no other place to go. Earth - this is it. We are part of this living organism. There is no place for the construction and separation into otherness. Law holds the capacity to regenerate the whole, the collective will of humanity. But what keeps us from beginning a proper dialogue is our different ways and different knowledges.

7.2 Knowledge

David Peat has written about indigenous knowledge as being non-transferable, unlike that in the west, where knowledge is directly transferable. Our knowledge and culture are lived. Our knowledge lives in the land and becomes known from walking the country. 'Knowledge belongs to a people, and the people belong to a landscape.'⁵

The love for the land could be seen in the pristine nature and ecology that met the invader, the love is expressed through our continued relationship as custodians. We

³ Evidence White, Lavina, FNICJ Transcript, 1996 Vol 11:72.

⁴ Jopson, Debra, Roberts, Greg, 23/02/99 Sydney Morning Herald, 'Belfast Aborigine'. During a visit to Australia Sinn Fein President Mr Gerry Adams introduced himself on his first morning in Sydney as an Aboriginal person from Belfast, during an address where he called for the equal treatment of Aborigines.

⁵ Peat, D, 1996:63.

are the carers, the lovers of our ruwe. To translate this love into a written form is impossible, it is an experience, a feeling which is nurtured throughout our indigenous history and through the laws of respect, caring and sharing. The love of land is translated more easily through the song laws.

Knowledge in the Nunga context, unlike that of the west, involves a process which transforms and brings with it obligations and responsibilities; custodial obligations to ruwe, for future generations.

A person comes to knowing by entering into a relationship with the living spirit of that knowledge.....Traditional songs are said by anthropologists to be lost, as are certain languages. But traditional ways are still alive because they have existence as spirit energies and powers.Although traditional ways may appear to be lost, some elders are confident that when the time is right this knowledge will come back. Like the grass that grows again each spring, it will reappear in dreams or during ceremonies.⁶

Telling of stories, and dancing and singing perpetuate the traditional knowledge, and when the singing stops the process of transferring knowledge still continues in dreams and visions. Prophecies come in dreams telling of all the changes to come and the destruction of the law, people and the land. Chief Oren Lyons calls these instructions and rules, laws of existence, which if not followed, will ensure our extinction.⁷

⁶ Peat, D, 1996: 67-68.

⁷ Evidence Lyons, Oren, Chief, FNICJ Transcript, 1996 Vol 1:54-56.

The problem we have in entering into communication or a dialogue with the non – indigenous world is that our ways of viewing the world are in opposition to each other. The following illustrates these oppositional thought patterns:

Indigenous

obligations to renew land

balance and renewal

lateral thinking

consensus

justice, harmony

Non-Indigneous

land ownership

progress, accumulation, control

lineal thinking

hierarchical patriarchy

adversarial punishment

Other differences exist in that which I have discussed in chapter 5, in relation to the knowledge of the law from a Nunga perspective. Nunga law is layered; parts are public, other parts are veiled in secrecy. In contrast the West projects the idea of the law as being open, accessible and free to all those seeking the knowledge.

Our law is a living law, an idea which is difficult to translate to a world which is dominated by the muldarbi. We are in opposition to the ideas of the muldarbi, to ideas which are killing of our law. Is it possible for us to create a space where we can draw breath from the genocide? What is the process which could create the space for this to occur, where the dialogue could begin?

7.3 Song in the land of the muldarbi

Recently there has been an attempt to bring the law back into the conscious realm of the Kaurna who have been impacted by colonialism since 1836 and have been described by ethnologist Norman Tindale amongst others as a group that no longer exist. The Kaurna people of the Adelaide Plains have had a city built on their country, following massacres, disease and dispossession. The Kaurna people are not extinct. There are many Kaurna families who still live in Kaurna country. Georgina Williams is a senior member of the Williams family clan of the Kaurna and Narrunga peoples and has been an advocate for the recognition of the Tjirbruki song since the early 1980s. The following is an interview with Georgina Williams:

- I ask the government to give back the land where the spirit of Tjilbruke⁸ walks... and cries... his tears making the springs of water for his people. The
- government must give back the song places of the spirit of Tjilbruke so that
- we can sit there and be one with the Earth again, and all the things of the Earth's creations in the spirit of life of the planet. Sellicks Beach is a special gathering place for the people, Red Ochre Cove is too ...the gutted remains of the pyrites mine at Brukunga shows what remains of the peaceful Kaurna people. The animals, the plants, the fish, the wind and the sea, the earth and the fire, the warmth of the sun to embrace me. All these things live on in the spirit of Tjilbruke. This is my constant vigil for the people, and my family clan...the Williams/Rankine descendants of Tjilbruke ...we need the spirit of Tjilbruke to guide us home to our true nature, as our symbol of life of the planet Earth. Tjilbruke brought all these tribes together into one federation of

people called the Kaurna, and taught us how to live in peace with each other, the earth and other living things. So those places must come back to us as sit-down places. A sit-down place is where you can sit and learn what was there before, and replace what we can. Once a year we need a gathering for the Tjilbruke, to inspire that back into people, the way to be a peacemaker, to be one with the environment, the natural world. ...Learning from the land is absolutely important. You are out in the open, you can actually see the day. This particular day wouldn't be here five years ago...this is summer, but it's cold as winter. The weather has all been changed. You can watch the speed with which this greenhouse effect is happening with your own eyes. I saw it coming, I heard the earth scream, it hurt me just the same as if my skin ripped. The Nungas need to touch the land or they lose their spiritual connection to it. Our feelings get all stripped away from us and we become hard. Little kids traumatised, young parents drinking, because of the stress, living in houses like boxes...there's a lot of smacking and hitting going on in our lives today. You can't sit down close to the earth and feel the pulse, the rhythm of the earth and the cosmic world which we belong to fades from our vision. By walking over Tjilbruke you connect to the earth and history of the Kaurna. Walk along there with no shoes on, you can feel that all the living things in the creation of the earth is touching you.⁹

⁸ This is a spelling that was used in the publication of the interview of Georgina Williams, Tjilbruki is recognised by the Kaurna as the appropriate spelling.

⁹ Williams, Georgina, 1990:3-4.

The work of Georgina Williams has been to find a way to enter into a dialogue with the muldarbi for the greater recognition and protection of the Tjirbruki song. The following is one version of the Tjilbruki story:

Tjilbruke¹⁰ was a Kaurna ancestor, who was respected as a compassionate and wonderful person, skilled in hunting and in the use of fire. One summer a group who were camped at Rapid Bay decided to go hunting the plentiful emus in the Tandanya lands. Included in the hunting group was Tjilbruke's favourite nephew Kulultuwi and two half brothers, Tetjawi and Jurawi. During the hunt the law was broken and Kulultuwi was murdered by his cousins. Upon discovering the death of his nephew Tjilbruke took revenge upon those responsible and all of the others who were complicit in trying to cover up for the death of Kulultuwi. This took place at the camp of Warriparinga. The tears of Tjilbruke's grief for the death of his favourite nephew Kulultuwi created the fresh water spring at Tulukudank providing water for the Kaurna people's summer camps. In his grieving for the loss of his nephew Tjirbruki carried the body of Kulultuwi along the south coast grieving and crying on his journey. At each place he stopped and cried a spring was created. After leaving the body of Kulultuwi near Cape Jervis, he travelled on to a high hill called Longkowar and here his journey ended. No longer wanting to be a man he transformed himself into the ibis, flying over the country to finally rest at the place Brukunga.¹¹

¹⁰ This spelling was adopted in the published story of Tjirbruki.

¹¹ This is an edited version of the story, that was told to Norman Tindale by Milerum, and is cited in Watson, Irene and Georgina Williams and Ruby Hammond, 1986:4-7.

7.4 Can we come to peaceful co-existence?

At I write this thesis, Nungas who allow themselves to be sited in a place of 'leadership' are talking of a 'treaty'. They propose a treaty in the hope that it will take us from the belly of genocide.¹² I argue that we cannot treat with the muldarbi at this point in our history. The time is not with us, the muldarbi still runs amok, and is not ready to treat with the law.¹³ The muldarbi is not ready to leave its muldarbi clothes and sit properly in the murrabina. Before this occurs talk of treaty is meaningless.

'When they come here they come the wrong way.'¹⁴ Kevin Buzzacott is talking about when the coloniser first set foot on our shores. They did not come through the law. Instead they brought a law of rape and ever since that time they have continued to violate our laws.

Murrabina is a celebration for the renewal of life, and the changing of seasons; this is law. Murrabina is a declaration, an agreement with the spirit world, the air, earth, water, fire, animals, plants, rocks, and the fullness and oneness of creation, for the

¹² Article in the Sydney Morning Herald 'ATSIC to join calls for treaty' on the 23rd January 1999, by Janine MacDonald. The chairman of ATSIC Mr Gatjil Djerrdura, at an Australia Day Address, supported the call for a referendum of all indigenous Australians on the question of a treaty. The chairperson, amongst a number of other 'Aboriginal leaders', is a signatory to a newspaper advertisement demanding a referendum as part of the forthcoming ATSIC elections. The main coordinator of the campaign Les Malezer, suggested the election of delegates to negotiate a treaty with the government, and Mick Dodson asserted that the electorate was competent to consider these questions.

¹³ The Sydney Morning Herald, reported by Margo Kingston on March 6th 1999, the Prime Minister's rejection of a compromise form of apology to the stolen generations suggested by his Council for Aboriginal Reconciliation. The draft included a heavily qualified general apology to Aboriginal people for past injustices designed to accommodate Mr Howard's refusal to budge on an apology. The draft states: "We hereby take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives." The wording was designed to give Mr Howard a way out of his refusal to apologise officially to the stolen generations by putting the word "apology" in the mouths of indigenous Australians.

continuance of law, land and peoples, an agreement to engage in the wholeness of the creative process of living in law.

From Kaldowinyeri Nungas have lived as sovereign peoples, respecting and recognising the sovereignty of others. The hundreds of Nunga nations which existed at the time of colonisation are evidence of this respect and recognition for each other. The European idea of that which constituted sovereignty was a concept alien to Nungas; we have our own understanding of each other's sovereignty, and gunyas¹⁵ have their way, a way that has yet to re-enter the respect law of ruwe. They have failed in understanding our sovereignty. This is the unfinished business which must be completed before we can enter a dialogue that is fair, just and equal. This process must establish itself before there can be discussion of 'treaty' between the peoples who occupy this country now named 'Australia'.

Gunyas in their different understanding of that which constitutes sovereignty, 'know' the sovereignty of indigenous peoples is extinguished, and in opposition we declare our sovereignty in the law of song, a law which can only be extinguished through the creative processes that sang it into being. In giving evidence on the importance of retaining the *Northern Territory Land Rights Act* in its current form, the following statements were made by elders who were amongst those who led the land rights struggle in the Northern Territory when they walked away from the pastoral stations where they had worked as slaves for the pastoral industry.¹⁶ The statements were

¹⁴ The author recorded an oral statement made to an Aboriginal meeting at La Perouse on the January 26th 1988 by Kevin Buzzacott.

¹⁵ Means non-indigenous person.

¹⁶ The people walked away from the pastoral station owned by Lord Vestey to set up a new community at Wave Hill.

made to the House of Representatives inquiry into the recommendations made in the Reeves Report to change the Act as follows:

We have one law. Our law is still the same. Government, when you have elections every three years, you change the laws. Our law is still the same since time began. We are not going to lose our grandfathers' Dreaming, our fathers' Dreaming, our mothers' Dreaming, our mother's grandfather's Dreaming - it is there forever; it never changes. Our law is still the same. You cannot take that away from us.¹⁷

They are always the same. Our grandfathers, our fathers, our Dreamings, our sacred sites, we want them left untouched. We do not want that changed. Some of our people are buried in those burial sites. We want to leave it untouched. Nobody is to go near it. We want to hang on to our law. We want to be strong. Our law is still the same. We want it to keep on going on and on for ever, since time began. No-one is going to change that.¹⁸

I have been a spokesman since the land rights began 30 years ago. I walked up from the Wave Hill Station. I feel uncomfortable and unhappy about the way that the government is trying to change our lives. Why is the government trying to take our rights away? First of all we fought for our land rights, and now the government is trying to take our rights for the second time. We are relying on a federal government to listen to our people say that as from today

¹⁷ Evidence of Jimmy Kelly, before the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act*, Tuesday 13 April 1999, at Kalkarindji, p295.

we will never ever take anything out from John Reeves. I represent not only the Guridnji and Warlpiri people but I represent the Aboriginal people in the Northern Territory. ...Aboriginal people do not change the law. We would never ever change the law until the world ends. Every Aboriginal person in the Northern Territory, whatever tribe they are, we do not change the law. Interpretation is made by lingo. But law and order, Dreaming - the things we do-are the same in Territory or in Australia. We have walked away from the darkness, we walked in the light. We have looked for our right, and John Reeves is deducting our rights from us.¹⁹

It is clear that the government has nothing to offer us in the form of a treaty agreement or a document of reconciliation. Every negotiation we enter into with the government takes us further into the colonial system, into their understandings and relationships to land law and culture. We have not reached a point where we have sat and talked about the land in the way it is for us, as the lovers the carers for ruwe. We have not yet had the opportunity to have those ideas shared and acknowledged.

In the past that which has been called negotiations between Nungas and the Australian government has resulted in the validation of non-indigenous title, and the extinguishment of native title. The reconciliation process which has been established by the federal government for almost a decade, has failed to deliver even an apology

¹⁸ Evidence of Lily Hargraves, before the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Reeves Report on the Aboriginal land Rights (Northern Territory) Act*, Tuesday 13 April 1999, at Kalkarindji, p295.

¹⁹ Evidence of Billy Bunter, (a comical name of the coloniser given to or imposed over the traditional skin name) before the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Reeves Report on the Aboriginal land Rights (Northern Territory) Act*, Tuesday 13 April 1999, at Kalkarindji, p298.

from the federal government for generations of genocide in the form of a deliberate policy of removal of indigenous children from their families, culture and laws.

If we are to negotiate in this context, a context that remains colonial and hostile to our perspectives culture and laws, than what is it that we hope can be achieved? One example of negotiations between government and Nungas is found in the following: Georgina Williams on behalf of the Williams family clan and the state government of South Australia:

I continue the battle for our SURVIVAL...I have been trying to get the S.A. government to acknowledge a just claim to return the DREAMING SONG land areas...this is called TJILBRUKE, an ancient wisdom of the Kaurna, a Dreaming of my Grandfather's Mother's people. I ask the government to give back the land where the Spirit of Tjilbruke walks...and cries...his tears making the springs of water for his people.²⁰

These negotiations were an attempt by the Kaurna made from inside the belly of genocide to gain recognition and protection for the song and the places of Tjirbruki.

During discussions with the Minister of Environment and Planning Susan Lenehan in July 1992, it was submitted that the sites of Tjirbruki could be returned to the custodial ownership and management of the Kaurna people. Many of the sites referred to in these discussions were in danger of further damage from housing and highway development, traffic, and erosion of cliff and slopes to the beach at several sites. It was submitted that the state relinquishing its power of control over these sites

and their return to the Kaurna would begin a healing of the genocidal wounds suffered by the Kaurna. A return of the song places of Tjirbruki would provide a basis for the Kaurna, a community like many other which is on the brink of almost total cultural annihilation, to regenerate culture, law and traditions. Attempts to continue discussions with the state government were bureaucratized and finally fobbed off.

The work to gain recognition of the Tjirbruki song however was continued by Williams. There were negotiations with the major suburban local government Marion Council to protect the first of the Tjirbruki sites, that at Warriparinga. The concept promoted in these discussions was to establish a model agreement with the Marion Council which could be ratified by other local government areas, (such as the Onkaparinga and Yankalilla councils) where the song of Tjirbruki travelled. The model which has since taken form establishes a Forum to facilitate agreements about the recognition, protection and creation of access to the places of Tjirbruki between the Kaurna, the land owners, local government and state and federal government interests in the land.

One response to the ideas initiated by Williams resulted in the establishment by the Marion Council of the Warriparinga Interpretive Centre Inc. The Council has also entered into a memorandum of understanding with the State Kaurna Aboriginal Heritage Committee, to work towards the establishment of the Kaurna Living Cultural Centre. However, there are important issues which are left unresolved: ownership of the site, caretaking and spiritual custodianship, self-determination for the Kaurna in their control and management of the site, and ownership of their cultural property and

²⁰ Williams, Georgina, 1990:3.

knowledge which it is proposed will be used in the Kaurna Living Cultural Centre. In the process of seeking funding to build a cultural centre and discussions with council, the real business of the song of Tjirbruki which lay in the land, has been forgotten. The original intentions of the project have been swept away in the cultural tourism hype, the design of buildings, and the provision for cafes and sale of aboriginal culture have gained priority concern. In the real world these concerns have the potential to provide employment for Nungas, so on one level the cultural centre becomes its own necessary evil, but on another it buries the original intentions and the spiritual significance of the site and our relationships to it. The good idea has been replaced by the vision of huge tourist potential and tourism dollars. The promise of Kaurna self-determination and ownership of cultural property become blurred and the old muldarbi rears its head as the Marion Council hangs on tight, to a concept that was birthed by the land but has now become something else. Those original dreams and visions became appropriated and consumed. Williams in entering into a dialogue with the Marion Council and its committee structures became absorbed by that process and found that it was impossible to exchange ideas in a place which offered security and equality. In the process Williams struggled to speak in a voice that could be recognised, one that spoke of and from a space which reflected a traditional Kaurna model. In speaking on how the places of Tjirbruki could be recognised and protected from further damage the 'messengers' of this story were treated as if erased, as extinct peoples. And in such a dialogue there is nothing which protects the ideas, provides a protection which sanctifies and recognises the sacred and traditional space from which they come. Once elucidated, they are deemed to be of the free market capitalist world, yet another commodity to be consumed and exploited. Our ideas and cultural

knowledge are stolen and greedily consumed in the same way our lands have been stolen. Another wave of dispossession.²¹

When I observe recent developments in Australia embracing Nunga culture, I see a process of them looking at us. I watch them looking at what they call art but what we call law and culture. I watch the participation in what you call cultural tourism but what I call life, living in the law, blessing and being blessed in a reciprocal cycle of life and inter action with the natural world. We live in spirit connected but are contained physically by colonialism, 'allowed' to go native when the tourist bus arrives. With the popularising of our cultures we are now experiencing a new face of the muldarbi as it appropriates our culture and laws to legitimise its own unlawful identity. The genocidal process of taking our culture and laws is likely to conclude in the complete ideological conceptual subordination of Nungas. This will conclude the physical subordination and genocide we have known for more than 210 years. When this is completed the last vestiges of Nunga culture and law will be gone. Non-Aboriginal people will then claim to 'own' our heritage and ideas as thoroughly as they now claim to own our land and resources.

The appropriation of our cultural and spiritual belongings is evidenced in the efforts made by Nungas to secure ownership of our cultures and knowledges.²² At the 1992 UN Sub Commission on the Prevention of Discrimination and Protection of

²¹ These ideas were taken from personal communications with Georgina Williams in Adelaide during May 1999.

²² Cultural property is distinguished from intellectual property, in the western legal context, cultural property is deemed as the physical expressions of culture, for example, dance, song, music, and art. Intellectual property is viewed as ideas. This distinction between cultural and intellectual property does not apply in the Nunga world.

Minorities forty fourth session, the following resolution 1992/35 of 27 August 1992, expressed that:

there is a relationship, in the laws or philosophies of indigenous peoples, between cultural property and intellectual property, and that the protection of both is essential to the indigenous peoples' cultural and economic survival and development.²³

Aroah Mead argues that all 'heritage', intangible and tangible, including lands, waters and resources constitutes cultural property, but the western view is that all natural resources are regarded as tradeable commodities and not an expression of cultural identity.²⁴ As with the places of Tjirbruki the connection that these places have to both our law and culture is not fully digested or understood by westerners, instead as I have said above they are marketed as a saleable tourism commodity. The touring into our culture and laws is the closest white people are able to come in negotiating a protection of our sacred places. Similarly the traditional owners of Uluru are left to balance daily breaches of law and culture against a hungry world starved for a view of culture and a 'different' experience.

Both domestic and international law does not acknowledge our ownership of traditional knowledges. At the 1996 July meeting of the World Trade Organisation's Trade and Environment Committee, Canada and the US expressed the view that, traditional and indigenous knowledge was not an 'intellectual property' that could be protected by law.²⁵

²³ Cited in Mead, Aroah, Te Pareake, 1996:4.

²⁴ Ibid:5.

²⁵ Cited in Mead, Aroah, Ibid:7.

The appropriation of indigenous knowledges is a global phenomena, where we are now experiencing a new wave of colonialism and dispossession. The most scary examples of appropriation are found in a project known to Nungas as the *Vampire Project*. On the 14 March 1995 the US National Institute of Health was granted a patent on the genetic qualities of a Hagahai citizen of Papua New Guinea.²⁶ The law on patents has been used to take ownership and control over the genetic material of a human being. This muldarbi process has potential to be extended to patent every conceivable living organism in the natural world. One dubious response to this appropriation is found in the 1992 *Convention on Biological Diversity*, Article 8 (j) which relates specifically to indigenous knowledge:

Subject to national legislation, respect, preserve, maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practises and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.²⁷

The idea of sharing knowledges and benefits that arise from shared arrangements at first glance appears worth consideration. However our ability to navigate a course of equality, one in which indigenous peoples rights to protect intellectual property is recognised and protected, in a world which is dominated by the muldarbi and its capitalist economies, is difficult to envisage.

²⁶ The patent is called Papua New Guinea Human T-Lymphotropic Virus, US Patent No 5,397,696, cited in Mead, Aroah, Ibid:9.

The ideal is one where we are able to participate as equals. However the historical process of colonialism has relegated us to places where we are precluded, dominated, and extinguished. Why is the indigenous horizon denied life? There can be no meaningful talk of healing the breaches of our law in the form of a treaty unless a space is given for the song law to freely sing, a space which is free from the interference of the muldarbi. The talk of treaty can only begin when there is an honouring from the other side and a commitment to leave the clothes of the muldarbi, to enter a new way which is no longer killing of law.

The space free of muldarbi is a space to love the ruwe and its song law. Love of ruwe and its song law is the ground which needs to be established, before any meaningful dialogue begins. When I speak of space and establishing ground I am not simply speaking of issues of land ownership and control although the resolution of these issues is fundamental to our life. When our old people spoke of being the boss or the owner for country, their meaning of being in ownership encompassed a relationship of love for ruwe, a relationship which is ancient, created from Kaldowinyeri, and travelling into the future of Kaldowinyeri itself. The relationship to ruwe goes on forever, it cannot be traded or sold in exchange for beads, or money. There can be no lawful agreement as to the selling of ruwe or its songs, for they belong to its Creator.

The gaps in understanding how it is we speak to each other, with the prevailing dominance of the muldarbi way of knowing illustrates my point further. The ground work is yet to be done, the muldarbi is yet to shed its clothes and come to a place of humility. A place where it can re-visit its own colonial histories and come to

²⁷ The Convention on Biological Diversity 1992, was agreed to through the UN Conference on
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apprehend that we were not the 'primitive peoples' they had constructed. We were peoples who held deep attachments to country and had understandings of processes of negotiation with outsiders coming onto our lands.²⁸

If the proper relationship to ruwe, song and people had been understood by Columbus and Cook, they would have discovered more than territories known to us from the beginning. They would have learned that we had no concept of selling, or consenting to the destruction of ruwe. The gunya myth of trading beads with a simple people was a lie, no more than a colonialist fantasy myth. Their dreaming come true - land for nothing - their muldarbi feasted. It was a lie, a burden on future generations to which we are all now bearing witness. The new generations are no longer sustained by ruwe, as she hardens, from past and continuing violations.

The application of terra nullius to Australia was a muldarbi rule which excused the coloniser from not only their failure to negotiate a treaty with the Nungas but more importantly, their reluctance and failure to come to ruwe naked, to sit by the fire in the murrabina properly. And now still there is reluctance. But I am reluctant as well. What would a treaty do for my relationship to law, and my love for ruwe? The power of muldarbi runs amok and its face is ever present in all spaces and places. What space is there for a treaty, in the shadow of our recent history and the contemporary scams of native title?

Environment and Development (UNCED), and cited in Mead, A, 1996:13.

²⁸ See Schulte-Tenckoff I, 1998:244-245 for a discussion on how primitivist assumptions have dominated the discourse and interpretation of treaties negotiated between colonial governments and indigenous peoples.

What do we need an agreement on? Who would be the parties: hundreds of Nunga nations, the Commonwealth, and the states? Who would do the treaty talk? Would negotiations be with 'key government negotiators' and 'key aboriginal leaders'? We have already been down that path, with the *Native Title Act 1993*. Those negotiations and the resulting legislation were not based upon any lawful Nunga process or agreement. The resulting legislation the *Native Title Act 1993*, was imposed by the Australian government and fuelled by the greedy intentions of the muldarbi, hungry for another free feast. The muldarbi worked its magic with the aid of the popular media to convince the world of its lie, once again it has created the illusion of a just settlement. The history of terra nullius is still with us. How can we talk of treaty while the boundaries of terra nullius have not shifted?

For the process to be lawful it is necessary that an agreement or 'treaty' is coming from a place of equality in which the Nunga nation is equal in status to the Australian state, where both are equal in their identity in international law. Isobelle Schulte-Tenckoff argues that the:

...intelligible rationale for treaty-making is what Jorg Fisch calls negative equality. Peoples previously unknown to each other, he writes, can only envisage a form of exchange that entails identical rights and obligations for all, with relations firmly confined to the realm of external sovereignty. In this sense, controversy arises from the fact that non-Indigenous treaty parties at one point shifted from that rationale and abandoned reciprocity as a fundamental principle of law.²⁹

Detmold argues that in contract law equality is not implied from the terms but that the implication is of the equality of the parties. He suggests that these 'fine ideas' have this origin:

They are creative understandings of contract itself, not inventions. The equality of the parties to a contract is the absolute essence of the thing. *There is no law of contract without it.* If the parties are not equal, the stronger imposes upon the other. To the extent that that obtains in a case there is simply no contract. Far from being invented, if this principle were not fundamental there would be no law of contract at all.³⁰

The idea of a treaty is the same as contract; the same principles apply. Without the equality of the parties there can be no law of treaty. The negotiated arrangements entered into between states and indigenous peoples are imposed, relationships are unequal.

The colonising states instead have adopted what Isabelle Schulte-Tenckoff calls the paradigm of domestication. Within the domestic context there is no lawful treaty, because the state has denied the equality of international personality to Nungas. The treaty dilemma experienced in North America is well expressed in the following quote:

To put it in a nutshell: by virtue of 'quasi-sovereignty,' Indigenous peoples were sovereign enough to enter into treaties with the purpose of ceding legal title to their lands and territories, but were not sovereign enough to continue to function as independent political entities. Nor, for that matter, were they

²⁹ Schulte-Tenckoff, I, 1998:267.

sovereign enough to protect the remnants of their sovereignty against incursions of the state.³¹

What would be achieved through a process of a treaty agreement where the state does what it has done throughout its whole history: subjugated any 'agreement' to its will? Treaties proposed between us and them are not dissimilar to the idea of Jews entering a treaty with the Nazis. What really would be the point? There would be none, not unless there is recognition of the equality of the parties to any agreement.

The following quote translates the oral history surrounding the negotiations of a treaty in 1876 between Canada and an indigenous people:

Our Elders in council sat together and swore by the sacred objects to the ultimate truth that (the Treaty) would be carried out without disruption. A representative of the Crown came and sat with our people. (The commissioner) was asked if he understood that this pact is with life, with the Spirit, to take care of our future needs, because there is no way that they could replace what the Creator has placed here for us, what we had and enjoyed since time immemorial. He said that "We don't come here to take away your way of life; everything will be parallel. The land that you allow us to use - no way will we take away your lakes, waters, rivers, animals, fish, mountains, forests; they are still yours, and you will always have them." Again and again,

³⁰ Detmold, Michael, 1994:236.

³¹ Cited in Schulte-Tenckhoff I, 1998:254 taken from Ward Churchill and G T Morris, 'Key Indian Laws and Cases' in MA Jaimes ed, *The State of Native America* South End Press, 1992 Boston at p 18.

four times, this person was asked: "What are you pledging, what are you promising?" My father passed this on to me.³²

In reference to the above quote Isobelle Schulte-Tenckoff argues that there are different desires and misunderstandings between the treaty parties'. The indigenous people enter into an agreement based upon the understanding that the principle of reciprocity applies, 'while states, ...utilize treaties initially to gain territorial or other advantages and ultimately to achieve hegemony.'³³

A self-government agreement between Canada and the Inuit, in 1993 evolved from one of the largest land and sea claims ever settled in Canada. On the 1st April 1999 the new territory of Nunavut, in Canada's eastern Arctic region came into being. Nunavut was previously a region within Canada's Northwest Territories. At the present time the Inuit comprise 85per cent of the 27,000 residents. The history of negotiations for the agreement began in the 1970s but more recent developments can be located on the 4th May 1992, when 54 percent of all voters in the Canadian Northwest Territories accepted a proposal dividing the territory into an eastern section, Nunavut, and a western section, Denedeh. The land division was supported by the Inuit proponents of Nunavut, but opposed by the Dene Nation (who opposed a similar land claims agreement) and the Metis peoples in the west.

The land claim negotiated is known as one of the largest "comprehensive claims" in Canada. Comprehensive claims cover lands where there has been no previous treaty

³² Cited in Schulte-Tenckoff, I, 1998:263

³³ Ibid :264.

or agreement signed, and aboriginal title has therefore not been extinguished. The extinguishment provisions are found in Article 2.8.1 of the agreement:

Article 2.8.1.. Inuit hereby:

(a) cede, release and surrender to Her Majesty in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada, and

(b) agree, on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for a declaration, claim or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty in Right of Canada or any province, the government of any territory or any person based on any aboriginal claims, rights, title or interests in and to lands and waters described in (a).

Negotiations with the Inuit focused on both the land claims settlement and the creation of Nunavut. The Nunavut agreement has been proposed in the past by the Northern Land Council as a model for future directions in Australia, in particular the Northern Territory. However, the rights claimed by the Inuit under the agreement are primarily administrative, not legislative. The approval of a Canadian federal government minister is still required for most decision-making, so ultimate authority still lies with the federal government, not with the indigenous people. The management boards and even the eventual territorial elections are not intended to be for Inuit self-determination, but rather for lower administrative institutions of Canadian government; that is, 'self-government' rests on the presumption that

Canadian national values, not indigenous values, determine the rules of the game. The Nunavut territorial government will be an Inuit government only as long as they remain as they are today the majority, currently 85 percent of the population of Nunavut is Inuit. If this were to change with Inuit becoming the minority, they would have negotiated away aboriginal title rights for the money (while it lasted) and the control over government while they remained a majority.³⁴ In response to those concerns it was conceded by Mr Okalik, the newly appointed Inuit premier, that the time could come when Inuit were no longer the majority and a non-Inuit could be elected premier. "That would be up to the people," he said. "We're a democracy like anywhere else."³⁵ But what is the future of the Inuit when that day arrives, when they are no longer a majority? How will their democracy work for them when that time arrives? The Nunga experience of democracies where we are a minority, has been one of exposure to genocide and the theft of our lands.

For 'proper' dialogue we need to begin again, from the time Cook set foot upon our shores. He needs to walk back in time, holding the flag in his hand, row back to his ship, and wait there, wait there for the old people to sing him a welcoming to ruwe. Then he needs to sit down and wait for the smoking, and the cleansing of his spirit. Then the teaching could begin. Cook could learn what the protocols were for him to observe in his coming to our ruwe; that there was already law, and that it was in song and land. For him to come into that place, he would have to learn the 'proper' way to come to ruwe.

³⁴ See Policastri, Joan, 1992, for discussion on the issues arising out of the Nunavut agreement.

³⁵ Reported by Depalma, Anthony, in The New York Times Monday 5 April 1999, *One man's tale is a symbol of hope for his people.*

So the songs would be sung, from the shores of this land now called Australia. The offspring of all the boat-peoples who reside here now and the Nungas, like those in the Waargle who left the law, need to go, sit down and re-learn how to come into ruwe, its song and ceremony. That is the law, the law which has been violated for more than two centuries. The breach of it needs to be mended, so that we can begin to talk, for the first time, because we have never sat down and talked about the important business of ruwe and its songs. We need to sing for this time when Cook returns to his ship, and comes to ruwe in this new way. Cook and his mob need to come, say sorry, compensate for the muldarbi they carried with them and learn from the old people how to smoke the muldarbi from our shores.

The lawful relationship of this old ruwe is the one it has always been. The laws are alive in the land and the spirit of the song still walks the land. This way is the basis of any future relationship. This is a different and more complex process than that which the Australian government and some 'Aboriginal leaders' are currently proposing. If negotiations were to follow that which has occurred in the past, the process would (at the best) involve the gathering of the head of government(s), 'representative' Aboriginal bodies,³⁶ and their 'key Aboriginal negotiators' with the political system of the coloniser waiting in the wings to whip the result of negotiations through its parliamentary system, as they have done in the past with native title and other genocidal legislation. The Nunga process is different. It is engaged in the law of ruwe, or the peace and shared love for ruwe and song. A lawful treaty process

³⁶ A definition of representative bodies was created by the *Native Title Act 1993*, and includes ATSIC, land councils, legal services, health services, community organisations. They do not always represent the interests of traditional owners.

requires it come to the earth of our mother in a way which is the proper Nunga way, a way which enters the land in respect and reverence.

The law of this old ruwe, of creation, is the only lawful basis of a treaty between the holders of law – song, and those who share this ruwe. We can agree to co-exist in the laws of ruwe and they are to not trespass onto the land of others, and not to take the resources of the land if that leads to an imbalance in its ability to re-create. That is one lesson we have learned from our relationship to the muldarbi and the damage it has done to our ruwe.

Are people who have unlawfully invaded and occupied our ruwe for more than two centuries ready for this process? Ready to unknow naked, to discard the clothing of the muldarbi and walk gently across the ruwe in a way which is proper? We cannot enter a treaty to negotiate the plunder of ruwe and our natural world. We have a mandate to care for and nurture all things for the benefit of future generations still coming. We have an obligation to pass on country for the future. We cannot enter agreements that would destroy life and ruwe. Proposals to develop sites for nuclear waste dumps, or for the mining of the land, which pollutes and destroys the natural world, are examples of muldarbi deals.³⁷ We can only engage in lawful agreements that will heal the destruction that has already been done to our lands and our lives, not

³⁷ There are native title agreements which have established this muldarbi process. The Beverly Uranium Mine in mid north of South Australia and the Kistler Space Base at Woomera also in the mid north of South Australia. A native title agreement was brokered by Warren Snowden and Mick Dodson between the multi-national corporation Kistler and the native title holders of the lands at Woomera for the proposed space base. More recently there is talk of a native title agreement being entered into for the building of a nuclear waste depository dump at Billa Kallina in the north of South Australia.

to continue the process that will bring death to us all and our natural world. We cannot enter a treaty that will birth or make lawful the muldarbi.

Our sovereignty and right to self-determination have never been surrendered or lost, they cannot be extinguished. Our sovereign laws are laws which were birthed by the Creator and given to us to teach us the role of being the lovers of ruwe, the custodians and the carers for country. The Australian state does not have the law to extinguish 'law' the Creator's laws. The state itself is based upon unlawfulness; it is a muldarbi thing. It has bred itself from the muldarbi seed terra nullius. The state in talking about a treaty, is a party which comes to the table as a muldarbi. The traditional owners/custodians cannot treat with the muldarbi. What would be the purpose, what would be the result? It could only produce a muldarbi deal. If in the process of treating with the enemy-muldarbi, the agreement was that the muldarbi would be no more muldarbi, that is an agreement to extinguish the muldarbi was done, then we would have the capacity to begin the songs again, with the muldarbi no more and go on with the business of caring for ruwe.

In talking of agreements or treaties, the issue of representation arises I have raised it above already. Who represents the old people gone and yet still with us, and who represents the children still coming, and how is the natural world represented? The Aboriginal leaders, the black men in suits were presented as the chosen ones, with a lawful mandate, to negotiate on behalf of every Nunga Nation the *Native Title Act 1993 (Cth)*. Similar processes continue as these men in suits negotiate and assert a

mandate on behalf of 'traditional owners'; as they sit at the table and enter into native title agreements and begin to talk of a treaty.

Haida elder Lavina White also holds concerns for entering into treaties with the coloniser:

We didn't treaty – ...before the white man came, ...– because we lived on the honour code and because we had the respect law and that pertained to most of the native nations, we had no need for treaties. We had no treaties even with Canada because we cannot treaty our lands away. And the only way they'll treaty with us is not a friendship treaty or a peace treaty, but to take away our rights on our resources and to be the people that are governing us. And we can't do that.

Our Creator gave us instructions on the contrary to that. And so we cannot treaty with Canada. If our people treaty with Canada, then we cannot go to any court in the world to try and redeem our sovereignty or our lands. And so I do not look forward to any kind of a treaty except the ones between – of friendship and peace between the natives.

And I understand from many of the elders in some of the ones that had treaties, that they weren't treaties to give away their lands. They didn't cede their lands, they didn't cede their sovereignty. They were treaties of friendship. Our philosophy as most of us know, most of the nations have the same

philosophy, the highest philosophy we have is of sharing. And that's how we lost control of our lands..³⁸

Chief Oren Lyons describes in 1613 the Wampum as the original treaty of agreement between the coloniser and the First Nations. The philosophy behind the agreement was a respect for all things of the creation, even the white man was also a part of the creation. The Wampum is one row of beads representing the first nations canoe, the people the way of life and another row of beads represented the white people and their boat and way of life. It represents them going side by side down the river of life linked by three-chains of peace, and friendship forever. As Oren Lyons spoke to the United Nations General Assembly at the 1993 opening ceremony for the International Year for the World's Indigenous Peoples he said:

Even though you and I are in different boats - you in your boat and we in our canoe - we share the same river of life. What befalls me, befalls you. And downstream, downstream in this river of life, our children will pay for our selfishness, for our greed, and for our lack of vision.³⁹

'As long as the sun shines, rises in the east and sets in the west, as long as the water runs downhill, as long as the grass grows green, our relationship will continue,' these words are repeated in many of the different treaties throughout Great Turtle Island. The words hold the key to understanding the indigenous way of seeing the world and the understandings the people had when they entered into agreements with the colonising powers. But in countries such as the Great Turtle Island and Aotearoa,

³⁸ White, Lavina, FNICJ Transcript, Vol 11, 1996:104-107

where treaties have been negotiated between the First Nations and the settler state, we find the states are busy re-defining the treaty terms negotiated, and replacing the international character of the treaties with a domestic interpretation.⁴⁰

One of the recommendations made by Jose Martinez Cobo in his *Study of the Problem of Discrimination against Indigenous Populations* was that a study of treaties and conventions signed and ratified between governments and Indigenous Nations and Peoples be completed.⁴¹ As a result of this recommendation and also extensive lobbying from indigenous peoples, a Treaty Study was commenced in 1988. Its author Miguel Alfonso Martinez,⁴² from the beginning recognised that “the norms and customs that regulate the life of Indigenous populations” were to be placed on an equal footing with “public international law...and the municipal law of the States.”⁴³ However it is interesting to note that in calling for equal treatment, Martinez uses the language of inequality, that is, our laws which are to be in equality with public international law and municipal law of states are named norms and customs.

³⁹ Cited in Schulte-Tenckhoff, I, 1998:247-248. The author refers to the Two Row Wampum and the two parallel rows of beadwork as representing a relationship between parties which are sovereign yet united by a common destiny.

⁴⁰ See Schulte Tenckhoff 1998 for further discussion on state attempts to erode and dismantle treaty agreements.

⁴¹ Cited in Schulte-Tenckhoff 1998:241, *Study of the Problem of Discrimination against Indigenous Populations*, by Jose Martinez Cobo, Vol. V “Conclusions, Proposals and Recommendations” Geneva: United Nations, 1986, Sales No 5.86 X1V.3, paras. 388-392.

⁴² Ibid, Martinez is a member of the United Nations Working Group on Indigenous Peoples, and also the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, and author of the *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, Preliminary Report*, 1991 UN doc. E/CN.4/Sub.2/1991/33, further treaty reports are; *First Progress Report*, by Miguel Alfonso Martinez, Special Rapporteur, 1992, UN doc. E/CN.4/Sub.2/1992/32, *Second Progress Report*, by Miguel Alfonso Martinez, Special Rapporteur, 1995, UN doc, E/CN.4/Sub.2/1995/27, *Third Progress Report*, by Miguel Alfonso Martinez, Special Rapporteur, 1996, UN doc.E/CN./Sub.2/1996/23

⁴³ Cited in Schulte-Tenckhoff, I, 1998:241.

The Treaty Study has however revealed what Schulte-Tenckoff refers to as the paradigm of domestication. It is argued by Schulte-Tenckoff that the current Treaty adjudication process functions and is contained by 'the paradigm of domestication, for it favours one treaty party, the state, in every instance'.⁴⁴ Against the paradigm of domestication the special rapporteur of the *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, argues:

In establishing formal legal relationships with Indigenous North Americans, the European parties were absolutely clear about a very important fact: namely that they were indeed negotiating and entering into contractual relations with sovereign nations, with all the legal implications that such a term had at the time in international law.⁴⁵

7.5 Australia a place of reconciliation?

What does reconciliation mean for Nungas? To end more than two centuries of genocide and dispossession or to forget the past and also the possibility of a Nunga future? Reconciled to what? To the current situation of inevitable genocide, or to one that is heading down a road to recovery in a context which is Nunga? The federal government in enacting the *Council for Aboriginal Reconciliation Act 1991* (Cth), attempted to foster a process of reconciliation between Nungas and non-indigenous

⁴⁴ Schulte-Tenckoff, I 1998:257.

⁴⁵ Ibid:260 and taken from the First Progress Report supra note 20 at para. 138, and Second Progress Report, supra note 20 paras. 130-133.

Australians. However the process has not yet produced any movement away from our current and continuing path to genocide.⁴⁶

When I think about the reconciliation process, I am still left with the question: what will happen to the pain we still carry in ourselves and in the land? When someone is murdered there is a process which is in place to right that wrong. In our tradition we called it payback. But what is in place to right the wrongs which have occurred and are still occurring in the lives of Nungas? There is nothing. What is in place to ensure the perpetrator will not re-offend? Who will monitor the future struggle of Nunga peoples to survive? The colonial state? Does it have any interest in letting us live in a way that is Nunga. To date it has indicated it has none. So how will a simple process of reconciliation alter history and the opportunity of a future?

Reconciliation and healing are global issues for all peoples who are thinking about the future of the planet.⁴⁷ While talk of reconciliation continues, the economic and social indicators reveal all areas of Nunga life continue to deteriorate.⁴⁸

An alternative to the reconciliation process has been activated by the members of the Aboriginal Tent Embassy, in their 'Declaration of Peace' on the 27th of January 1999.

⁴⁶ For further discussion see Gilbert, K, 1993:2.

⁴⁷ See Watson, I, 1997, for further discussion on reconciliation.

⁴⁸ NSW Department of Corrective Services figures show that the average numbers of Nungas serving full-time in the State's prisons rose from 354 - 8.5 per cent of the jail population in 1987 - to 912, more than 14 per cent of all inmates, in 1998. Figures released to the Sydney Morning Herald show that by June 30 this year the number had jumped to 979, more than 15 per cent of the entire full-time prison population. Aborigines still make up less than 2 per cent of the general population. Corrective Services figures show that the numbers and proportion of Aboriginal prisoners in periodic detention has also ballooned, from 15 - comprising just under 4 per cent of the total in 1987 - to 103 in 1998. Nungas now make up 7.7 per cent of these detainees. Every year for the past five years, four Nungas have died in NSW jails. Over that time, they have comprised between 10 and 22 per cent of all annual prison deaths.

They have called upon the Commonwealth Government to honour international laws and standards by commencing a genuine process of decolonisation of our territories now known of as Australia. The government is called upon to recognise the sovereignty of the Aboriginal Peoples and Nations and to return to us all stolen lands. They have called upon the government to stop the crime of genocide currently being perpetrated upon Aboriginal Peoples and Nations, and to apologise, repatriate and compensate Aboriginal Peoples for those crimes. The Aboriginal Tent Embassy lit the ceremonial fire for peace one year previously; it burned continuously for the whole year.⁴⁹

Howard's cabinet answered the Aboriginal Tent Embassy's Declaration for Peace by instructing the Australian Federal Police and Australian Protective Services to move the ancient peaceful ceremonial gathering, on Monday the 15 February 1999.

On the 18th February 1999, members of the Aboriginal Tent Embassy met with the Governor General of Australia, requesting that he use his constitutional powers to dismiss the unlawful government of Australia and to intervene in the Australian government's attempt to dismantle the 27 year old Aboriginal Tent Embassy from the grounds of Old Parliament House. In response the Governor General advised the delegation that he could not act.

⁴⁹ *Secret plan to close Aboriginal tent embassy.* Reported by Helen McCabe in the Daily Telegraph, 25th January 1999. "The Federal Government has enacted a 68-year-old law, a 1932 trespass ordinance late last year for the 'parliamentary triangle', the law was introduced by the Territories Minister Ian Macdonald. The area that the law applies to includes the lawns of Old Parliament House where the tent embassy has been camped for 27 years. Government sources said talk of the plan had been kept confidential because of fears of violent demonstrations similar to those in 1972 when the then Liberal Government moved to tear down the embassy.

Attempts to reconcile indigenous peoples globally have been made through the UN in the Drafting of the *Declaration on the Rights of Indigenous Peoples*. However now that the Draft Declaration has moved onto the Human Rights Commission indigenous peoples have concerns about its future. The Human Rights Commission at their February-March meeting in 1995, passed a resolution to establish its own Working Party to continue drafting the Declaration. During the last week of February 1999 the UN in Geneva began talks on the future of the UN WGIP, with the recommendation coming from the Human Rights Commission to close down the WGIP. It was suggested that the WGIP could be replaced by a permanent forum for indigenous issues. It was also reported that the forum would be established at a higher level than the current WGIP within the United Nations. It is suggested that the forum would be on a par to the UN Economic and Social Council, or ECOSOC.⁵⁰ It is interesting to note that no state opposed the initial proposal to establish the forum. However some questions remain unanswered: what role will indigenous peoples play and what role will the states play in the future of the Declaration? Will the voices of indigenous peoples be heard equally to those of the states?

What this means for the future involvement of indigenous peoples in UN processes is uncertain at this stage. If we are to go by past trends the states will retain power in the representation of Nunga rights in international law. In the past our struggle for recognition has been contained, subverted, and constructed by the UN, with little observance of or respect for our claims to self-determination.

⁵⁰ Reported in the Ottawa Citizen, February 18th 1999.

Remedies to stop the genocide of First Nations have been put to us by Lavina White, Haida elder, in her evidence before the First Nations International Court of Justice:

I think it's the first step towards unity of all Aboriginal people, all Indigenous People on this side of the world for we need to join forces. And I think the first step towards liberation is right in this room.And so today I want to join you in charging Canada and the Queen's representative, I would like to see us charge them with grand larceny, with fraud and with genocide. And I feel very strongly about that and I know many of our people do. Every colonized country can join forces for we need to save Mother Earth who is our nurturer. ...I think the answer, and I hope this is the beginning of it is for us that have been colonized throughout the world and especially on this side of the world, to join forces because we get no response from the United Nations, we have to form our equivalent. For unless we do that, we do not have a planet. We will never get an answer from UN for it is the same people that colonized us.⁵¹

7.6 Naked, black bodies, love not hate

Through oppression and domination colonialism imposed its way of seeing upon us; it introduced shame of the naked body, and replaced a love of being with self hate. bell hooks discusses how black self hatred is internalised, in the contemporary African American context; it is a phenomena that has relevance to our situation and that all

⁵¹ White, Lavina, evidence before the FNICJ 1996, Vol 11:69 and 78-79.

other peoples of colour who are marginalised by a dominant culture.⁵² A strategy to survive internalised colonialism or a way out of self-hate is a love of self; Thurman explores forms of black resistance in the following quote:

‘Black is Beautiful’ became not merely a phrase-it was a stance, a total attitude, a metaphysics. In very positive and exciting terms it began undermining, the idea that had developed over so many years into a central aspect of white mythology: that black is ugly, black is evil, black is demonic. In so doing it fundamentally attacked the front line of the defense of the myth of white supremacy and superiority.⁵³

hooks writes about love of blackness as being a form of resistance from the destructive influences of white supremacy, and points to the civil rights movement in the United States as being ‘rooted in a love ethic’.⁵⁴ The idea of a love ethic is not that different from the approach that the animals who lived at the time of Gurukmun used to bring water back to the dry lands. A love ethic of the land is a natural extension of a love ethic of the self, the black self, the Nunga self.

Those shamed in their awareness of naked need to unlearn and become unknowing of their nakedness. That process of unlearning the shame of nakedness is for humanity to learn to listen to the voice of the natural world, and begin to take guidance from the ngaitjes once again. The wisdom of the wise ones has told us everything has a reason. We were born with two ears and two eyes but one mouth; perhaps it is that we are to

⁵² hooks, bell 1995:32-33.

⁵³ Howard Thurman cited in hooks, bell, 1995:189.

⁵⁴ hooks, bell, 1994 :244.

listen and observe twice as much as we speak. In listening to the natural world we will hear the screams that Georgina Williams speaks of, coming from the earth.

For those who are not indigenous to this place you call Australia, the trek is yours ahead, to re-find those places and animals of the natural world that you belong to and that speak in your language. This is a journey into your own place of nakedness. Nature into nation is the path ahead of us, if we are to live. It is a process which is a reversal of that we have become programmed to understand is our future. For the indigenous - those who have left that place of nakedness - it is a journey, a trek back into Nunganness. Trask writes about the process of how indigenous peoples are taken from their own place of identity and the returning home:

...if Hawaiians were to improve their lot, they had to learn American ways. Of course, this is what Americanization seeks to do, namely, to convince conquered peoples they have no choice but to be Americanized. The ideology tells a tale of success: if one captures political power through the electoral process, one can do anything. Anything, that is, except live as a Native person.⁵⁵

As a strategy for survival Trask advocates peeling back the layers:

The first stage of resistance involves a throwing off, or a peeling apart of a forced way of behaving. Layers of engineered assimilation begin to come loose in the face of alternatives, Native cultural alternatives. Usually, this process means tremendous psychological tension as a conscious rejection begins with cultural habits first ingrained by a colonial education, a foreign

language, and a fearful daily relationship with the dominant, white class. Frantz Fanon identified this process as the birth of a new, revolutionary human being. Others, like the African writer Ngugi W Thiongo, call it “decolonizing the mind.”⁵⁶

7.7 Lawful and spiritual obligations to the earth.

And once that process has begun, peeling away the colonised layers, we see the land before us, and we hear the elders. The elders are speaking of the changing climate. In the past there have been prophesies that warned of a time when the people would be confused, and the old and the young would die first. The prophesies said the trees would die from the tops down and the world would be in danger. The story of the Frog tells of this time, a time when there will be no water left to share, the Waargle also tells of this time when law is no more, the will to live in law has gone from the greater humanity. The story of Tjirbruki tells us of the pain and sorrow of Tjirbruki in facing the truth of the murderous ugliness of humanity, there was nowhere left but for him to go into the natural world as he took flight in the body of the ibis.

At a conference in 1998 with NASA officials, and indigenous elders the following dialogue was reported:

We have long said that native prophesies are misunderstood. They not only are spiritual visions, but often also come from a life-science observation of the

⁵⁵ Trask H 1993,:119-120.

⁵⁶ Trask H, 1993:115.

natural world. When people understand that they are not separate from the natural world, they will seek to honour and understand it. This is why Chief Joseph said long ago that the Earth was part of his body and they were of one "mind". Native people traditionally have understood that the Earth and universe have a mind and a spirit, a cosmic intelligence that in fact responds to us, to our intentions.⁵⁷

So the senior law woman once said, 'This is my country, this is me'.⁵⁸ The old people respected and acknowledged their relationship and obligations to the mother earth. Through ceremony we honoured the mother and pledged our obligation as custodians of the land, for future generations. The earth was soft then. And as the ceremonies stopped, one by one, across the land, I heard her crying. 'Who is talking to me'? No one answered. The song peoples and dancers lay bleeding into our mother earth. And she began to harden, beneath concrete, the plough, and the open cut mine. The people who survived invasion and genocide were few. Those survivors who re-grouped and gathered in ceremonies were murdered, rounded up and dispersed by the agents of colonialism. There were many places where the only survivors were the young, too young to sing the story and dance the law. Those who were old enough could do nothing as they lay sick and dying from diseases deliberately spread. The survivors of the genocide were powerless to act against the stripping of the ruwe, our mother. But still death did not come to us, the spirit rose up to speak and remind us of who we are. The spirit law is in the land, still singing, waiting to be joined in song. The messenger

⁵⁷ Report of the Universal Press Syndicate, January 15, 1999, Column of the Americas, by Patrisia Gonzales and Roberto Rodriguez, "*Nasa Looks to native elders to help save the earth*".

⁵⁸ A quote taken from a senior Anmatyerre law woman, Kwementyai (meaning no name) Kngawarreye.

Tjirbruki is one of the old spirits that comes to remind us of our self and the way one should live as a being of the ruwe.

While the physical world has changed, and continues to change rapidly⁵⁹ the spirit realm remains constant. The spirit is in all things. It is the spirit that survives beyond the genocide. It is our spiritual connection to the law which sustains us. The life force of the spirit of the law is like the five ancestors in the *Waargle*, who continued to affirm the law, when all other peoples had abandoned and violated their own. It is strength of spirit that enables that process to continue when all else in the physical world appears to be falling apart. The time of the *Waargle* is a time that is with us today, a time when most of humanity has abandoned the law. Indigenous peoples whilst a significant global minority, are like the five spirits in the *Waargle*, still carrying the law.

The sun woman illuminates the future, a return to the beginnings as though we had never left that place. Our songs and stories gave us knowledge for survival, to live a good life in harmony with all things. The song law passed from one generation to the next and was taken on by each generation as an obligation and commitment to the spirit ancestors. The original agreements entered into are still alive, as are the obligations to honour them.

⁵⁹ For example, for the majority of indigenous peoples it is no longer possible to live a completely traditional hunting and gathering lifestyle. For many food is now gathered from the supermarket shelves. The impact of colonial policies of assimilation has also distorted many of our traditional cultural practises. The holding of ceremonies has been suspended over the larger part of Australia because of colonial policies and dispossession.

The caretakers struggle to care for the country as our obligations tell us we must. My mother does what she is able to do. Daily she watches over the place of the ancestors, as she plants back the trees for the birds in the hope that the water will return to the land. Georgina Williams struggles to enter a dialogue which will stop the erosion of the song places of Tjirbruki, in the hope they will honour the land and not steal the story instead. Kevin Buzzacott brings his story before the Australian courts in an attempt to have recognised his custodial obligations.⁶⁰

Our position is the same as the Haida in the following statement to the *First Nations International Court of Justice* by Haida elder:

We never ceded our lands. We never ceded our sovereignty. We're still sovereign people. We have no agreements with Canada and we have no treaty. And many of our people in British Columbia are reluctant to go through the treaty process because we find no honour in the imposed systems or in the imposed governments for they do not keep their word. In our culture we didn't have a written language, so your word was your bond. We lived under the honour code. And so when the people came and we shared our lands with them, we never thought there would be such a thing as charging the people with grand theft because we thought they were honourable too, that their words they gave us were what it really is.⁶¹

The agreements that some of our people are making today, some of our people are very fearful of, for we have no right to give away our lands. We have no

⁶⁰ *Buzzacott v Hill, Downer and the Commonwealth of Australia*, Federal Court Action No S23 of 1999.

⁶¹ White, Lavina FNICJ Vol 11:77.

right to give away our culture. We have no right to assimilate, for to assimilate is to do away with ourselves.⁶²

We have an onerous obligation to keep the ruwe as it was at the first sunrise. When Cook landed on our shores, he saw the land as it was on the first sunrise. Had he listened to the songs he may have begun to undress himself, so that he could properly hear what that song was singing to him. Cook may have learned to become a lover of his own nakedness and become like us, a passionate lover of the ruwe of his own place, whence he had come in his own nakedness. But that day ended and the darkness descended. But as with all cycles you will always have the light coming out of the darkness. For as long as the sun shines, the custodians will continue to take care of the land, and for the sacred places of the ancestors, for that is the law. As my mother cares for the sacred resting places of our old people so will I in my turn to come.

⁶² Ibid :88.

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