Aboriginal and Native Title Issues[1]

Hon Justice Gray[2]
Federal Court of Australia

I sometimes think that there is value in adopting a mirror world approach, turning things on their heads and seeing how they look I have a vision in which a number of pastoral leaseholders are required to prove their title to land. The pastoral leaseholders are required to do so before a group of old Aboriginal people who are sitting around The pastoral leaseholders produce their pieces of paper, their title documents. The old Aboriginal people say these are no good. They ask, "Where are your songs? Where are your stories? Where are your dances? Where are your body paintings? We don't recognise these pieces of paper" The pastoral leaseholders object. They say, "By our legal system, these are our title deeds." The Aboriginal people respond, "Well they are not by ours."

I think that one of the most exciting things that has happened in Australia in the last decade is that it is now officially and publicly recognised that Australia is a legally pluralist society. The reality is Australia has always been legally pluralist because throughout the human history of this continent there have been indigenous legal systems operating which govern the lives of indigenous people and govern their entitlements and their obligations with respect to land. Up until 1992 however, Anglo-Australians who had colonised the continent, paid little if any attention to the existence of the indigenous legal systems. In 1992 the High Court of Australia, in *Mabo v State of Queensland [No.2]*[3], did much more than simply recognise native title What the High Court did in *Mabo* was to say that native title is what the applicable indigenous legal system says it is. So as a result of this decision we now officially and publicly recognise that there are applicable legal systems other than the dominant Anglo-Australian legal system, and that these other applicable legal systems have consequences that are important to the Anglo-Australian legal system To find out what native title is it is necessary to know what the applicable indigenous legal system says it is.

The High Court in *Mabo*, also invented the term 'extinguishment'. Extinguishment, I think, is an unsatisfactory term because it implies that an interest in land under the indigenous legal system is destroyed by certain grants of title within the Anglo-Australian legal system. So far as the indigenous legal system is concerned, however, indigenous title to land continues even where there is a freehold grant, or a grant of any other interest, regardless of the fact that these are regarded as extinguishing acts by the Anglo-Australian legal system. Generations after such extinguishing acts, Aboriginal people will point to land subject to freehold or some other title and say, "That is my country" Right now, we are not grappling with that particular problem.

What the Anglo-Australian legal system is attempting to grapple with is the intermeshing of Aboriginal legal systems with it By recognising native title, and by recognising indigenous legal systems for that purpose, the High Court made it necessary for those involved in the Anglo-Australian legal system to understand indigenous legal systems. There can be no doubt that in this respect there remains abysmal ignorance. Since *Mabo*, statute has put the onus of proof on the indigenous people making native title applications to explain to us their legal system, to tell us what it

[1] This article is an edited transcript of a speech delivered at the Law Librarians' Symposium on October 2, 1998.

[2] Justice Gray has been a judge of the Federal Court of Australia since 1984. He is also a judge of the Industrial Relations Court of Australia, a Presidential Member of the Administrative Appeals Tribunal and a Deputy President of the National Native Title Tribunal. From October 1991 to October 1997 he was the Aboriginal Land Commissioner dealing with land rights claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* He has represented the Federal Court of Australia on a committee, chaired by Mr Justice Eames of the Supreme Court of Victoria, which oversaw the first Victorian Aboriginal cultural education course for judges and magistrates pursuant to a recommendation of the Royal Commission into Aboriginal Deaths in Custody.

[3] (1992) 175 CLR 1

provides about land tenure and, of course, to prove its existence. Before native title will be recognised a judge must be satisfied that there is a surviving indigenous legal system and that it governs the relationship between land and people. But the difficulty is that indigenous people have to prove these things in an Anglo-Australian legal environment subject to whatever modifications the legislature and the judges will tolerate in order to make concessions to the indigenous legal system. Therein, I think, lies a major problem. Another related issue is what effect involvement in the Anglo-Australian legal system may have on indigenous legal systems themselves.

Firstly, what do we know about the nature of indigenous legal systems? As I have said, not much. I belong to a very small percentage of Australian lawyers who have had any contact with indigenous legal systems and what you are about to get is a kind of distillation of some things that I believe I have learnt from six years of work in the Northern Territory. I emphasise that it is Northern Territory experience, although my reading suggests that some of it might have validity elsewhere, but I do have to tell you that I am totally, and regrettably, ignorant of Torres Strait Islander legal systems.

Aboriginal legal systems, so far as I am aware, are based on a concept that an anthropologist by the name of Stanner designated as 'the Dreaming'. The Dreaming involved a very great number of creatures, most of whom seem to have walked about a featureless landscape in human form, having two legs, two arms, head, body etc., and to have done things that were very much like what their human descendants did at a later stage. In performing certain actions, they formed the features of the landscape. Very often, these related to the creatures which the dreamings subsequently became, because the dreamings metamorphosed into animals, birds, fish and other phenomena, like lightning, bushfires and rain In moving about the landscape, they left behind evidence of what they had done, in the form of the features of the landscape. Very often, this evidence connected a particular area of land with the particular creature For example, snakeskin or snake tracks may be represented in the features of the landscape; and places where lightning struck rock are said to have made it red The dreaming beings also provided all forms of culture as it is now known. Language, songs, body designs and ceremonies, and all else that is regarded as 'the law', all came from the Dreaming and have been carried through 'unaltered' since that time

Non-Aboriginal people tend to regard the Dreaming as having occurred in a very distant past, a past which we call 'the Dreamtime' and which is now gone. That is not the way Aboriginal people tend to see it The actual creation era as it is envisaged by most Aboriginal people, occurred not very long before the life times of the grandparents of the oldest people now living. There is a tendency in all societies to be able to remember your grandparents but not to know much about whoever went before. The grandparents of the oldest living people are thought to have lived just after the starting point of the world. Aboriginal people sometimes have difficulty coping with the notion of 40,000 years of human occupation in Australia, because it does not seem like that. The Dreaming world is a real and parallel world to the physical one, so that a dreaming which is an animal is present in the form of that animal. Dreamings which are phenomena such as lightning or bushfires are present in the form of those phenomena. There is a constant interrelation between the two worlds.

Aboriginal culture is reflected in ceremonies. These involve painting, singing, dancing and the use of sacred objects. The ceremonies are celebrations of the dreamings and their connection with land, but they are much more than that. They are very much involved with the passing on of knowledge to those who are entitled to receive it, the rehearsal of knowledge already gained to ensure that it is kept in the correct form, the social organisation of communities and who is entitled to say and do what They are also very much about punishment of transgressions that have occurred leading up to them. They are often long and are complex. Often ceremony, song, dance and design are the very title deeds to land. The ability to have a particular design painted on your body, or to paint it on somebody else's body, to sing a particular song, or to perform a particular dance, is proof of entitlement to particular lands.

One interesting feature of Aboriginal law is that there is a tendency to maintain stoutly that it is immutable. Aboriginal people often express surprise that these whitefellas have a parliament that can change the law, because their law is as it was handed down by the Dreaming and cannot be changed. The reality, of course, is that a very considerable amount of change occurs. So you have a kind of Orwellian situation, in which everybody believes and asserts that there has never been any change and that what is now is what has always been, even though it might be perfectly obvious that what is now is very different from what was. In fact, the significance of sites will wax and wane, the significance of stories will change, the emphasis on things will change often, and new ideas, new phenomena that are encountered all the time are worked into the system of belief. For example, there are Aboriginal dreaming stories concerning Captain Cook. Interestingly, Captain Cook is often a kind of representative whitefella villain. These stories relate that there was a time when everything was all right, then Captain Cook came from big England and began to kill people. The fact that Captain Cook never killed an Aboriginal person is irrelevant - he represents the colonists. There are stories in some places, including the top end of Australia, in which Ned Kelly is celebrated as a dreaming hero. In some, Ned Kelly fought on behalf of Aboriginal people against Captain Cook. These things have been incorporated within the historical past, yet this knowledge is attributed to dreaming beings and therefore for Aboriginal people these stories have existed for all time. Of course there is no culture in the world that does not change. In Anglo-Australian culture, where knowledge tends to be handed down in written, rather than oral form, the law changes dramatically through time. Non-Aboriginal people should not be critical of Aboriginal culture for changing. Change does not necessarily imply that a culture is 'dying' or that it is now somehow inauthentic. Culture is always a living, changing thing.

Crucial to Aboriginal society and Aboriginal legal systems is an attitude towards knowledge and information that is very different from that with which we in this room are familiar. Our society treats information as a commodity. Basically, everybody is entitled to it. You can make money out of selling it. You put it in books in libraries and people are entitled to come and read it, absorb it and use it, provided that they attribute their sources. We live in a society that is information rich. We believe in spreading information around as much as possible. There are some areas in which we do not spread information freely, such as trade secrets, cabinet documents, legal professional privilege and so forth. These are exceptions, carved out of a society in which information is freely available to all. Indigenous societies have a completely opposite attitude to knowledge or information.

Knowledge in Aboriginal society is very much the source of power and entitlement, so that only those who are not going to misuse it can be entrusted with it. Often access to knowledge is restricted on the basis of age. You have all heard of the initiation of Aboriginal people when they reach a certain age. In truth that is a first stage and there will be a second and subsequent stages. At each stage, Aboriginal people will be entrusted with a higher, or deeper, level of knowledge than they were before, provided they prove themselves worthy of the responsibility of having it. Generally speaking, the last stage is reached when there is grey hair or a grey beard. I grew a beard during my six years as Aboriginal Land Commissioner on the excuse that the sun was damaging my face when I worked outdoors in the Northern Territory. The truth is, I grow a moth-eaten, shocking-looking beard, but I did discover that because it was grey, I had a lot more authority around the place than I had without it, so it had its uses. But the wishes of my beloved finally prevailed and I shaved it off.

Knowledge in Aboriginal society is a very restricted and closely controlled thing. Certain senior people are often entrusted with a great deal of knowledge. Even then, a senior person may only have knowledge about particular areas or particular parts of ceremonies and so forth. Other people will have other knowledge. There is a fragmentation of knowledge among the community. There is not a library where you can go and find out everything. If you were able to find out everything, you would have to consult a very large number of people and, of course, you would get different versions of a number of things from those people.

You would have to consult men about business that is secret to men and you would have to consult women about business that is secret to women. I was in the unique position as Aboriginal Land Commissioner, of being entrusted by women in some land rights claims with some secret women's knowledge. This evidence was heard in sessions restricted to women I was the only man present when the evidence was given. I can tell you that to hear the women's version of a particular story as against the men's version, both secret, is a particularly interesting thing to do. I regard it as a great privilege and of course I can not misuse it by ever revealing to anyone what I have been told. It is then difficult however, to write reports on land rights claims when you cannot actually say what the evidence was in some respects.

The Aboriginal style of safeguarding knowledge, of protecting information from being divulged to others, poses a real problem in terms of native title and court processes. In effect, we are now saying to indigenous people, "If you want to prove your native title, come into our court and give us your knowledge. Tell us what things are, tell us your legal system, make it public to everyone, spread it around, put it in reports and books and let the whole world know" Indigenous people are, understandably reluctant to do that. In effect, we are asking them, "In order to prove your legal system to us, destroy it, break it, smash it to pieces by demolishing the barriers to dissemination of knowledge."

You have often heard the sort of complaint that says, "Look, every time we have a new mining proposal we have a sacred site." Is it very surprising when you understand the creation stories that Aboriginal people subscribe to, the way in which the landscape was formed and the way in which knowledge is safeguarded, that a sacred site emerges only when there is some proposal to damage or destroy a place? It is not in the least surprising. Nor is it in the least surprising that the most secret, the most important information, is the very last thing to come out, when people are so desperate to safeguard a place that they feel the only way they can do it is to divulge this last bit of most secret knowledge. This might have been the very problem that was encountered in Hindmarsh Island. Here people said, "Look, there is a development project, someone has invented an Aboriginal story to try and stop it, and look, as we have gone further on with the project there has been more and more invention of this Aboriginal story." I do not know the details, but it is a possibility that the more secret information came out last because the situation was most desperate then

It seems to me that there is a problem with conflicting attitudes to written and spoken words between Aboriginal and Anglo-Australian cultures In our legal system, and in our society generally, the written word is often taken as gospel. It is thought to be objective and reliable. Someone has written it down, taking a good deal of care. Often it has been peer-reviewed and so forth, so we believe we can trust what is written down. The spoken word, in comparison, is thought to be subjective and unreliable. It is thought that it can be tailored to suit the occasion, so we tend to be suspicious of it. We tend not to want to rely on oral accounts. As a judge, I am only too well aware of a tendency within the legal system to clutch at documentary evidence when it is available.

Contrast that with Aboriginal people for whom what people say is the most important thing. What people say and where they say they got it from is what it is all about "My old people told me this." "My father told me this." That is the way knowledge is verified in Aboriginal society. A document that conflicts with the oral record is likely to be sneered at. This provides a great number of problems to the courts in terms of assessing oral records, especially where there are conflicting written ones, and giving them appropriate weight when making decisions The situation might be changing, however, largely because of a Canadian Supreme Court decision made in December 1997. The case of *Delgamuukw v British Columbia*[4], seems to be heralding a new era. The Canadian Supreme Court rejected the trial judge's distrust of oral traditions. Instead, it regarded them as having an indigenous context and inherent value. The Canadian Supreme Court took the view that oral tradition was something that could be valid independently of any written evidence, and that it need not be approached with the utmost suspicion. I think that heralds a bit of a change for us.

[4] (1997) 153 DLR (4th) 193

We have a problem, of course, with the application of the hearsay rule in our courts. The hearsay rule, and it's application to indigenous oral evidence, has been talked about in the *Gove* case[5] as well as in the *Mabo* case (which, in its Supreme Court of Queensland trial stage produced a very long judgment that goes to and fro about the difficulties of hearsay[6]). The difficulty arises when someone says, "I know I am entitled to this land because my father told me that." That is an out of court statement produced as evidence of the truth of the statement and it is therefore considered to be hearsay, of which the courts are extremely wary. The hearsay rule stands in the way of indigenous attempts to prove their legal systems precisely because within Aboriginal systems these kinds of statements present no difficulty.

The *Native Title Act 1994* (Cth) as it now stands since the latest amendment, reintroduces into native title applications the rules of evidence unless the court 'otherwise orders'. To find out what the rules of evidence are you go to the *Evidence Act 1995* (Cth), which fairly substantially liberalises the hearsay rule, allowing first-hand hearsay in many situations. But first-hand hearsay is not enough for an Aboriginal oral tradition, because often information has come from a person's father and grandfather and great-grandfather and so on. It seems to me that the circumstances in which the court will 'otherwise order', that is will dispense with the rules of evidence, are likely to be very controversial over the next few years in applications for determinations of native title.

There are problems when you come across inconsistent written records. A lot of missionaries and early anthropologists wrote down stories and other Aboriginal knowledge without what would now be considered sound research techniques. This issue arose recently in *Shaw v Wolf*[7]. In that case the question was whether certain people entitled to vote in ATSIC regional elections, were Aboriginal? The question of the descent of these individuals was explored. In evidence, genealogies drawn up by George Augustus Robinson were produced. George Augustus Robinson was the Protector of Aborigines in Tasmania back in the middle of the last century when people were being driven onto Flinders Island as a kind of Aboriginal colony. George Augustus Robinson was terribly concerned about the morals of Aboriginal women and whether they were sleeping with sealers and whalers, but was he a reliable recorder of biological parentage? A lot of missionaries could not cope with what they regarded as polygamous marriages and attributed the fatherhood of children to people who were not their fathers at all. A lot of missionaries could not cope with the local station-owner, or station workers, associating with the Aboriginal women and tended to allocate fathers to people willy-nilly. You cannot necessarily rely on the written record to any greater extent than you can on the oral. Justice Merkel in *Shaw v Wolf* gave weight to oral accounts even where they were inconsistent with the earlier written records.

Aboriginal native title applications also bring up what seem to be fairly basic issues, like communication issues, for the courts. There are language difficulties for many Aboriginal people in Australia. English is not the first language of many Aboriginal people. Where it is spoken, it varies from a language called Kriol, which is a kind of heavy pidgin English, through a pretty large spectrum of what is called Aboriginal English, which is classified as a dialect by linguists and is widely spoken across the north of Australia. The test for a dialect, as I understand it, is that a speaker of one can get by with a speaker of another. That is the case with Aboriginal English but there are traps. Aboriginal English has its own distinct set of rules and there are words that have acquired different meanings. Someone who is described as a 'cheeky fellow' in Aboriginal English may be likely to kill you rather than just be rude to you. And I mean 'kill you dead', because to 'kill you' might mean just to hit you to speakers of Aboriginal English. If you want to 'walk around', you must understand whether you are foot-walking, or walking by car, or by aeroplane. There are problems at a basic level about language but there are also problems about body language. For instance, to look you in the eye while addressing you is culturally inappropriate for Aboriginal people. It is considered confrontational. How many Aboriginal people have had their evidence disbelieved in court because they would not look at the judge or magistrate while giving it?

---

5 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141

6 [1992] Qd R 78

7 (1998) 83 FCR 113

There are problems of the phenomenon identified as 'gratuitous concurrence', which led in the Northern Territory to the creation of the *Anunga rules*[8], special rules about the interrogation of Aboriginal suspects by police. This is because it was found that if you ask enough direct questions, Aboriginal people tend to say 'yes' to all of them. There are lessons in this for cross-examiners and for judges dealing with cross-examination. The authoritative figure who says, "This is right, isn't it?" will very often get a 'yes', even though 'yes' is not the real answer. I once wrote something identifying about nine possible different meanings for the answer 'don't know' when given by Aboriginal people in the context of talking about land ownership. 'Don't know' can mean "It is not my country and it is not my place to talk about it" 'Don't know' can mean "Although I could talk about it, old so and so is here and she should talk about it because she is here" 'Don't know' can mean a great variety of things and, unless you start investigating what 'don't know' means, you can get yourself into really serious trouble.

There are also other conventions and speech rules that must be taken into account An example is not mentioning the name of a recently deceased person, even if it is also the name of someone else or some feature in the landscape. There is a fairly widely used Central Australian word, *kumantji*, which means 'no name', which is substituted for all these things. If in the evidence, you have reference to two Mount *Kumantjis*, three *Kumantji* creeks, old *Kumantji* and so on, pretty soon you have got a transcript that really does not mean an awful lot when you come to look at it You have to be very careful of these things.

The *Native Title Act* in its current form has removed the requirement that the court take into account cultural and customary concerns of indigenous people. Now the court simply has permission to take these into account but only if no other party is 'unduly prejudiced'. So we can look forward to some lengthy and difficult arguments about what is undue prejudice when invited to take into account cultural and customary concern.

If I can deal just briefly with a final point – the effect on indigenous legal systems of being drawn into the Anglo-Australian system. The legal process has the result of transforming this fragmented and sometimes secret oral knowledge into written documents, with various degrees of publicity attached to these documents. Oral evidence taken in the course of court proceedings is transcribed. Often it is transcribed very inadequately, because of accents, because of Aboriginal words, because of the sheer difficulty of picking things up, especially if evidence has been taken outside where there is a bit of noise around or other people talking in the background. There is always a degree of selectivity on the part of the transcriber when a written document is being created from an oral record You would be amazed at how many asides in court are picked up by the microphone and go onto the tape and the wise transcriber has to leave them out. You would be amazed at how many privileged conversations between counsel and instructing solicitor or client are picked up on the tape and have to be left out So there is selectivity employed and it is a familiar selection process for many transcribers. A transcript, of course, cannot catch the subtleties of pitch, of timing, of gesture. This is the case with any witness, let alone indigenous witnesses. So people say, "Well, listen to the tapes." There you run into the privilege problem You cannot edit the tapes to edit out what should not be heard and you cannot allow the other side, as it were, to hear the privileged remarks on the tapes.

Video taping can help but I do worry about adopting wholesale the practices of video taping, or photographing witnesses, which has also been suggested, for matters involving indigenous people when these practices are not adopted in other situations. What are we saying about Aboriginal people if we adopt the practice of photographing each witness - that they all look the same to us? When we start video taping and photographing witnesses in all long trials, then I think that perhaps we can start in relation to indigenous trials.

---

[8] *R v Anunga* (1976) 11 ALR 412

My predecessors as Aboriginal Land Commissioner developed a system of going into restricted session, sending all the women out when the evidence was restricted men's material or, as I mentioned earlier, on occasions I sent all the men out, except for myself, when the evidence was restricted women's material. The Aboriginal Land Commissioner obviously must be in attendance. So far, each person holding this position has been male. There are sometimes said to be penalties for men finding out about secret women's business, one penalty being your genitals begin to shrivel up. It is a heavy thing for a man to go into a secret women's session. Land rights claims have raised the problem of restricted material and there has been a very considerable amount of effort invested in trying to keep secret things that are said to be secret. But what happens when you have some restricted transcript, or a restricted exhibit, received in a land claim under the *Land Rights Act* and you have a native title application with respect to the next door land? Somebody says, "I want to get hold of that restricted transcript, I want to see if it is consistent with what people are now saying and I am entitled to see it." You get subpoenas, or you get requirements to produce documents on discovery, you get the court being invited to order that the documents be delivered up and inspected and so forth. The courts need to approach these things with great sensitivity. We had a conference of courts and tribunals involved in these matters to try and work out some way in which we can avoid trespassing on each other's orders restricting evidence.

Then you get to the stage of a judgment in a native title application or a report in a land rights claim. What you find is that you have collected and presented a vast body of knowledge that has hitherto been fragmented among various members of a community, or has been secret knowledge restricted to a certain class of person. You must document at least a certain amount of the evidence in order to rationally explain the decision. I have attempted to be very coy in all my land claim reports when I come to secret material. I hint at it, I say that it was secret material and so forth, but in the end if someone wants to test it on appeal they have really got to be able to see it. So every step along the way involves the destruction of the indigenous legal system itself.

Producing a written record of orally held knowledge also freezes it at a particular point in time. This disrupts the usual processes of change operating within an indigenous legal system. People with political agendas, or positions of power to uphold, can use what is written to their advantage and will do so, like anybody else. They might argue, "But the judge said ...", or, "The judge wrote down here that this is the case." Other people who might wish to argue to the contrary will find it more difficult to do so in the face of the written document.

So the process of constantly rationalising this unchanging Aboriginal law will itself be interfered with by the existence of a judgment, or a transcript, or documents created in the preparation of the application. Of course, our Anglo-Australian legal system will then continue to privilege the documents over future oral accounts as to what the indigenous legal system is. We must recognise that what we are doing is not only destructive of indigenous legal systems but is interfering with the processes which would normally take place within them. I think courts need to understand very well the process in which we are about to engage in relation to native title applications and the consequences to indigenous legal systems of engaging in these processes. I think that, in particular, the effect of the production and availability of documents needs to be understood by those of us who control the records, particularly librarians.

I have probably exhausted all my time but if you have got any questions I would be happy to try and deal with them.

Ruth Bird

Do you think if we gradually improve the teaching process of white Australians over a period of time that these things will improve? I mean can you see that the attitude will generally improve?

Justice Gray

Yes, I can. I do, perhaps in the face of the evidence, retain a good deal of optimism. I do so on the basis that the *Land Rights Act* in the Northern Territory has now had something like two decades of operation and it was different in my time from its early days. In the very first claim that was heard under the Act by Justice Toohey, vast numbers of objectors turned out waving their metaphorical weapons, determined to wipe this outrageous business off the face of

the earth and to show it up for what it was. Nowadays you hardly get anybody turning up, even to the most controversial claims and the process is very well grooved. People in the Territory have largely got used to the notion of Aboriginal land It has taken twenty years to settle the whole thing down. Native title is now at the early stage. I was the totally unsuccessful mediator of the Yorta Yorta application for a native title determination. There were, at that stage, three hundred and something parties and we started in the Shepparton Town Hall. People waved their metaphorical weapons and said what an outrageous thing it was and so forth I hope, and I believe, that in a couple of decades native title will become as much a part of the landscape as land rights is in the Northern Territory, if we will only allow it to do so.

There is an oddity about the Australian population that Stanner, the anthropologist, pointed to. He said that non-Aboriginal Australians will believe almost anything about Aboriginal people except the truth It is extraordinary, the myths that get around. You will always have, as I had up in the Yorta Yorta country, the amateur historians, who sidle up to you to tell you that these people are not really the right people for this area, that the right people got driven out years ago and these people came from somewhere else. You will get that everywhere in Australia You will always get the people that will turn up and they will say I have been coming fishing here for forty years and I have never seen an Aboriginal person in the place, as if by some rule Aboriginal people are obliged to identify themselves to that fishermen and say that they are Aboriginal people. You will always get that but I think you will get, over time, a great diminution of the perceived threat of native title to non-Aboriginal people

Ruth Bird

You were talking about time when dealing with the Aboriginal claims - do Aboriginal people see time in the same way as we see time, as when we want to settle a case we say it will take this long? There is a difference isn't there?

Justice Gray

One thing you learn very quickly as Aboriginal Land Commissioner is that the hearing will not run according to the timetable and there is no point in jumping up and down and being upset about that. When you are told that the convoy will leave at eight o'clock in the morning to go to a particular site, you turn up at eight o'clock in the morning and people are still rolling swags and all that sort of thing, you sit in your vehicle and listen to your tapes and, when everything is ready, off you go. Yes, there is a difference.

I have a theory that the major problem that besets Aboriginal and non-Aboriginal relations in Australia is that everywhere else the British arrived there were chiefs. You could identify the chief, you could go and talk to the chief, you could negotiate with the chief, the chief could talk on behalf of his people (and usually it was 'his'), and you could enter into an agreement and everything was all right But when they got to Australia and said, "Where is the chief?" everyone stared blankly, because that is not the system. The system is one of consultation. Working out and recognising the status of senior people, all the different senior people, indeed groups of senior people, takes time. The idea that you can deal with an Aboriginal community and simply say, "Get back to us next week with a decision on that" is completely false and, I think, unrealistic.

The other thing is that in Aboriginal society, confrontation is dealt with very differently. I was given an account by an American student on placement at the Central Land Council who came on one of my land claim hearings. He said that he had been to a community where a meeting was held about a mining proposal. The first thing that happened was that the mining people came into the place and they did their spiel and then they were asked to leave while there was community discussion about it. This student stayed during the discussion and he said it was perfectly obvious in the discussion that no one wanted this proposal to take place. So they invited the mining people back in, but of course nobody said 'no', because it is confrontational and shameful to say 'no' in response to a direct request. Nobody actually said 'no', so the mining people thought they were in with a chance, so they did their spiel again and they waited for the 'yes'. They still didn't get a 'yes', but they still didn't get a 'no'. They ended up going away completely mystified, thinking "What is going on with these people who won't say 'no', but they won't say 'yes'?" They should have realised that 'no' was the answer.

I saw a very graphic Aboriginal confrontation and learnt a tremendous amount from it. Some fellow was making a nuisance of himself around the place and the little old blind man said, "Well where's that so and so, bring him to me, I want to see him right here." So he came and he sat down right in front of him and they had a very polite conversation, in which neither of them mentioned the subject of the dispute. They said "well I don't want to talk about it", "well I don't want to talk about it either", they solemnly shook hands and they parted. And you thought what on earth happened there? But each understood absolutely the other's position and each had his behaviour modified as a result of this confrontation. It is just not something you or I would understand at all. There is a very big gap I think. Even where you find Aboriginal people who went to school at the same schools that we went to and lived in the same towns that we lived in there is a marked difference in perception, in communications, in behaviour generally and indeed in their entire world view. There are cultural differences that are much larger than many of us tend to think. We need to respect these differences and understand them before we can get anywhere.