I decided to revisit the Anunga Guidelines for two reasons. The first was the death in January of the Reverend Jim Downing. Jim had gone from being a Petersham Bikie to become a greatly respected missionary and linguist in Central Australia and later in the Top End. He was an important witness in the lead up to the formulation of the Anunga guidelines. Jim was passionate about the unfair treatment of aboriginal suspects who were at such a disadvantage in the hands of the police. Jim’s widow Shirley recently wrote to me and in part said “I do thank you and Tessa for your sympathy and your lovely endorsement of Jim’s life and work. The memories roll back to those extraordinary years in Alice Springs when we lived in the centre of a cultural conflict, in the centre of the town in the centre of the continent. Praise be for the positive steps..such as the Anunga Rules..and so much more.”

The second reason for revisiting Anunga was a conversation I had with a police officer at a reception at Government House a few months ago. I said I was thinking about writing a paper about Anunga and she seemed surprised as it was nowadays, she said, really a footnote to a general treatment of voluntariness. She suggested that the level of sophistication in the aboriginal community with the widespread use of mobile phones, internet, email, television and DVDs was light years from the situation in 1976 when the Supreme Court issued the guidelines.

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1 R v Anunga, R v Wheeler (1976) 11 ALR 412
Moreover, she said, it was drummed into recruits that a confession was no substitute for proper investigation and that it is common for aboriginal suspects to decline to answer questions put to them by police. This made me wonder, having been out of criminal trial work for so long, if the Anunga Rules had caused a shift in Police practice and had achieved their purpose. So I went looking for the transcripts of the two trials first of Anunga and others, and secondly of Wheeler and others. All that remained on the Anunga file was the indictment endorsed “not guilty” and the transcript of the guidelines as delivered together with arraignment transcripts. A month or so later the Wheeler file turned up and I suppose Justice Forster had collected all the transcripts in the one place to draft the guidelines but that the Anunga transcript had been borrowed by someone else interested in the topic. Then I followed through the subsequent judicial treatment of the Rules and finally inquired of a number of prosecution and defence lawyers Judges and Magistrates what their contemporary experience was. I thank them for their assistance the magistrates especially. I was also assisted by the staff at the Police College and I thank them. There is a Kerry O’Brien program about the Paula Sweet case with both he and Geoff Eames sporting Beatle’s hair styles. Very nostalgic.

**BACKGROUND TO THE TRIALS:**
Angus Anunga, Sandy Ajax, Clancy Ajax and Tjingunya were jointly tried before Forster J and a jury on one count of indecent assault and one count of rape of JB on the 11\textsuperscript{th} November 1974 at Alice Springs. JB was raped by aboriginal men near the banks of the dry Todd River behind the Oasis Motel. Each of the accused was interviewed by police and typed records of interview were produced in which each accused purportedly confessed to the crimes. JB was vague in the extreme about the number of men present and the number of men who had intercourse with her and was unable to identify any of the accused. Forensic examination did not reveal anything that incriminated the accused. The confessions were the whole of the Crown case. Forster J rejected them as not proven to be voluntary and the crown case collapsed.
Similarly Nari Wheeler and Frankie Miller Jagamara were charged on indictment with the rape and murder of Paula Sweet. Police interviewed each accused as well as four other men and obtained purported confessions. They did not further investigate the matter. Ian Barker and I did.

The relevant facts were that Paula lived with a white man who drove her about in a car for the purposes of prostitution. She had been a prostitute since the age of 12 according to information from welfare. The police claimed to have no knowledge of this. When Paula and her de facto argued, as we learnt they often did, he was in the habit of kneeing her in the stomach the police knew nothing of this. The police said they knew nothing of this. The police case as disclosed in the alleged confessions was that the accused and possibly six others assaulted and raped Paula in the Todd River bed, that she escaped and ran towards Woolworths and Monas Bar where either Nari or Frankie knocked her down (they both confessed to doing so without assistance) and that Frankie jumped on her stomach four times to stop her screaming and Nari kicked her in the ribs for the same purpose. Curiously having been raped in the river bed she still had her panties on and both Nari and Frankie confessed to having removed them at the site of the second assault. The panties were recovered there. Paula’s de facto had been driving around looking for her and saw her run from the river bed pursued by five aboriginal men. He did a u-turn and drove up to see a man having intercourse with Paula in some long grass. He did not see anyone jumping on her or kicking her but this must have happened in the 30 to 40 seconds it took to do the u-turn if it happened at all.

He drove Paula home and he told police she made no complaint to him of the assault. She was too drunk, he said. She did however say she had lost her panties. Her de facto told police she had slept through the night and in the morning declined the offer of a cold hamburger. She complained of a little soreness and declined to go to the police to report the matter. The de facto went to work and returned at lunchtime. She again complained of pain he said but did not want to go to the hospital.
He returned to work and it was 5.45 PM when he finally took Paula to the hospital where she was found to be in deep shock and was rushed into surgery on the point of death. Her ruptured spleen was removed and attention given to other injuries to her organs including her liver, kidney and intestines. She also had four fractured ribs. She declined to speak to police. She died a few days later from acute pancreatitis caused by the crush injury to the abdomen. The un-contradicted medical evidence was that she could not have lived more than 4-6 hours in her condition without medical intervention. 18 hours elapsed between the alleged assault and her admission to hospital.

Police interviewed the de facto and took a statement and he then drove with them about town where he first pointed out Nari as looking a bit like the man who he found lying on top of Paula and whom he had punched and he later identified Frankie as similar to another man there. They were invited to go to the Police Station where they were typed up. Neither man could read English and so the records were read back by a policeman not involved in the interview. The timing of one read back as recorded must have been faster than Lucky Starr singing *I've been everywhere man*. Each accused answered ‘Yeah’ to the accuracy of the readback. Each accused said on oath on the ‘voire dire’ that the words were the policeman’s words and not theirs.

Remarkably neither man was told that Paula was dead or that they were to be questioned about a rape and murder until the end of the interview. In an earlier case the interrogator agreed that knowing that you were being questioned about a murder might affect the free choice to speak or be silent. The reason given for this failure was painfully elicited in cross-examination;
MR BARKER:
It didn’t occur to you that it might be appropriate to tell Miller that he was being questioned about a woman’s violent death?---I gave thought along the line – I didn’t want to upset him by the fact that somebody was dead, being an Aboriginal.

But you said you didn’t have any particular reason?---I had given thought to what I said.

Well you do have a particular reason, do you?---Yes, sir, partly.

What is the particular reason again?---I gave thought – some thought – to the fact that some Aboriginals get upset regarding being told about death.

Why would it have mattered if he had got upset?---I felt it – or I wouldn’t be able to get a true account of what actually happened that night if he was upset.

You felt you would get a less satisfactory confession if he knew he was being questioned about a murder, did you?---No, I thought I would get a clearer (happening) of what had happened

Did you? You deliberately concealed the fact of this woman’s death when you started to question Miller, didn’t you?---Not deliberately. I gave some thought to it.

And the woman’s death was deliberately concealed when Wheeler was being questioned, too, wasn’t it?---Probably for the same reason. I think Graham would say for the same reasoning.

For the same reason – there is a reason; you didn’t want to upset Wheeler?---I think that Graham would – I don’t know what Graham thought.
JIM DOWNING'S EVIDENCE:
I earlier mentioned that Jim Downing’s evidence was important in the formulation in the Anunga Rules.

Barker and I had been referred to Jim by Geoff Eames then the senior legal officer with Central Australian Aboriginal Legal Aid. Downing was already well known to Ian. Geoff had seen a pattern emerging of typing up aboriginal suspects and relying solely on confessions without regard to consistency with objective or known facts. Geoff was keen to mount a campaign to expose the practice and achieve some fairness for his aboriginal clientele. He had plenty of cases in the pipeline and so he briefed Barker and I and in one case Terry Coulehan as well to put forward the proposition that police were authority figures and despite any caution the continuation of questioning would result in answers being given. Also to get out of a stressful situation the person being questioned would tend to give the answer that the questioner seemed to want. This was in addition to the proposition that for cultural reasons and with communicative difficulties the caution could not be understood.

This campaign covered at least six or seven trials the initial four being before Justice Muirhead who despite clear confident assertions by illiterate accused to questions asked on the voire dire such as “Are you an airline pilot?” Yes I am an airline pilot accepted the police evidence that by experience they had no trouble communicating with aboriginal suspects and that such confident answers could be relied upon as truthful. The evidence of Jim Downing did not convince him otherwise. The last two cases which produced the Anunga Rules were heard by Justice Forster and it is likely that even if the confessions were voluntary in the Wheeler case there should be a directed verdict of acquittal of murder on the basis that the accused did not cause the injuries from which Paula Sweet died. The flavour of Jim’s evidence can be gleaned from these extracts.
MR BARKER:
And from time to time you have seen Aboriginals in the custody of the police?---That’s right

You have given some consideration over the years to the position of an Aboriginal in custody, have you?---Yes

Particularly with reference to his interrogation by the police?---Yes

What has been your interest in that side of your activities?---I have been both asked by Aboriginal people to help them because they have felt at a grave disadvantage in those sorts of situations and I have been asked to help in court. I have been asked to give papers on this matter, one at a Jurists’ Conference, and I have been asked by Committees of Inquiry as to problems of this nature

The paper related to problems in police and court proceedings relating to tribal aborigines---Yes

You have also had discussions with magistrates, judges and lawyers about the problem?---Yes

What is the problem? Can we identify that?---The problem is twofold; basically one of communication. Secondly one of cultural disadvantage in dealing with an authority situation in another culture. My observation and experience I have gathered has indicated that people in not only a police custody situation, but in a court situation too, are extremely apprehensive. Only if they happen to be regular drinkers are they likely to be familiar with court proceedings or court language and I have become convinced that the majority, if not all, tribal Aboriginals (I would say all) are unable to understand that nature and concept of the caution which has to be administered to them
Are you referring to the caution that they don’t have to answer questions but if they do the answers may be recorded and given in evidence?---That is correct.

Have you tried to make Aboriginals understand the caution?---I have done this for the police; I have attempted to do it in the language and have been completely unsuccessful.

How many times have you tried?---I couldn’t tell you that – a number of times.

Do you know why you have been unsuccessful?---I think so. I think it is because it is virtually impossible to get across to an Aboriginal person the concept that an authority figure, who in his eyes, has very considerable authority – in this case a member of the police force – that in asking him questions or even conveying to him the warning – I have not been able to get across the idea of not having to answer if he doesn’t want to; but even supposing he could understand that concept (and I have grave doubts about that) if the authority figure then goes on to ask questions the person is bound to feel that he must answer; that this person would not be asking him questions if he did not expect him to answer and that his authority is so great that he must answer anyway. That is generally the case.

Is this attitude to authority figures confined to policemen?---No, but I think it is probably most marked in relation to policemen because they do appear to have much more real and visible authority than other government officials.

Have you had experience of the approach of tribal Aboriginals to government officials?---Considerable
And in the context of what we are talking about – the Aboriginal talking to the authority figure – what can you say about that?---I can say I have experienced and also been given evidence of countless situations in which government officials have gone to tribal communities to consult them and have come away with answers which, in that situation have been either quite false or quite wrong answers. I would go further and say that Aboriginal Affairs is littered with failed projects on the very basis of this kind of mis-translation and the people have given answers because the authority figure has – maybe not aggressively, but by being there and continuing to ask questions in the eyes of Aborigines has demanded answers and the people have often spelled out the reasons why they have those answers – in some cases quite definitely false answers. They have said that they have given them because they were embarrassed or because they were afraid, or because they were fed up with the persistence of this person and wanted to get him the hell out of there fast.

Would you always expect an Aboriginal being interrogated by a policeman to answer his question?---Yes. When I say ‘always’ I think there is the rare instance where somebody is just completely silent and will not or cannot say anything, I have been called in on a couple of occasions by policemen to help them to interrogate somebody because they cannot get a word out of them.

Apart from those occasions, are there any other reasons apart from the approach to the authority figure that would lead to an Aboriginal being interrogated in a police station answering questions?---I think his general fear and apprehension.
Jims evidence was well borne out by the evidence of the detective sergeant who interrogated Frankie Miller;

How many full blood Aboriginals have you interrogated from the time you have been in the police force approximately?---*A large number, sir.*

Hundreds?---*Possibly a hundred, sir.*

And is it your normal practice to give a warning, the judges rules caution before you interrogate full blood aboriginals?---*It is normal to give a caution which is drawn up by persons of authority which the judge has suggested we should use.*

Do you normally, before interrogating an Aboriginal, tell him that he need not answer your questions?---*In a series of questions yes, sir.*

You always administer that caution with some care, do you, to Aboriginals?---*To most of them, sir.*

It is not the case with white people though, is it?---*Not all of them, no.*

To ensure they understand their rights at law?---*Yes, sir.*

Can you tell me one occasion on which a full blood Aboriginal has declined to answer your questions, having been warned that he didn’t have to?---*I cant remember any, sir.*

You have had 100% success rate with full blood Aborigines?---*It appears so, sir, yes.*

The approach of police at that time is exemplified in these questions and answers;

Were you in charge of this investigation?---*Yes, sir.*
Did you make a thorough and searching inquiry?---I believe I did.

It is a very serious matter, isn’t it?---Yes, sir.

And initially you charged all the accused, including some who are not here, with manslaughter?---Yes, some of them.

And the two accused here are now charged with murder?---Yes, sir.

You tell us, do you, that your inquiries into the death of Paula Sweet were thorough and searching and adequate?---To the best of my ability I believe I did carry out a thorough investigation.

You left no stone unturned?---Well, I don’t know, sir.

You were very active in getting records of interviews typed up, weren’t you?---Yes, sir.

You always are aren’t you?---I don’t know. What do you mean sir?

You did not do much investigating besides interrogating suspects, did you?---No sir.

You thought it wasn’t necessary when you and the confessions?---I believe I had sufficient, sir.

And you stopped the investigation?---I believe I completed the investigation sir.

By securing confessions?---Yes sir

Did you check the confessions against any object(ive) facts you knew of?---Only against what each other said.
As Forster J observes in the guidelines at no 5;

_Even when an apparent frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources – Failure to do this, among other things, led to the rejection of confessional records of interview in the cases of Nari WHEELER and Frank JAGAMARA._

The officer was not too keen on aboriginal liaison officers either;

_Do you have police liaison officers at the police station?---Yes sir_

_What are the functions of the police liaison officers?---Their duties are to assist Aboriginals who come to the station._

_And one of their duties is to sit in when Aboriginals are being interrogated?---If they are available, yes._

_Did you have them available on 4 May?---I don’t think they were available sir._

_Did you find out? Did you make an inquiries?---I am unable to say if they were even employed at that date sir. I am not sure._

_I think you may take it that they were sergeant. This was 4 May this year. Did you try and get a police liaison officer to sit in at any of the interrogations concerning this matter?---I cant remember._

_Did Graham try to get a police liaison officer?---No, I cant remember that either._
HIS HONOUR: Can you tell me this, sergeant: Do you know (and you may not) if these liaison officers are on duty so long as there are white policemen on duty? In other words, do they work Monday to Friday or do they work at weekends?---*They only work Monday to Friday sir.*

HIS HONOUR: Subject to being called in, I suppose, are they?---*Yes, they would be available to call out, sir.*

Mr Barker: And you could have called on in, couldn’t you?---*If one had been available, yes, sir.*

But you didn’t bother to find out?---*I can’t remember if I did or not sir.*

You know perfectly well you didn’t, don’t you?---*I can’t remember sir.*

You can’t remember?---*No sir.*

Do you call them in when you are interrogating aboriginals these days?---*Yes, we have been of late, yes.*

You have been of late?---*Yes, we have been.*

Do you find them a help?---*Not much help at all.*

Not much help?---*No sir.*

Do you think the suspect might find them a help of a comfort?---*They might be a comfort, that is about all.*

Do you think they are a waste of time?---*That is my opinion sir.*

That has always been your opinion?---*I beg your pardon?*

It has always been your opinion since they were first employed by the police force?---*Yes, that is my opinion sir.*
The role of prisoners friend and the importance of interpreters arose in examination of Jim Downing and it is interesting to note that Downing recommended that the prisoners friend be a European person not an aboriginal person. Ian Barker asked;

Can you suggest a way in which the problem of the interrogation of an Aboriginal by a policeman could be at least partly solved?---Yes. Ideally an Aboriginal person – or semi tribal Aboriginal person – should never be interrogated in English. They should be interrogated though an adequate interpreter. I recognise practical difficulties here, but if that could not be done then I think they should never be interrogated without a third person being present – that is a European person known to the Aboriginal person and acceptable to him to stand in that function, and I think this would both encourage the Aboriginal person and help to prevent some of the quite false answers that I am convinced are given.

HIS HONOUR: Mr Downing, what view would you take of their being present an Aboriginal person who was a person of importance?---I don’t think this would work, Your Honour, because he too would have the same difficulties with English and the same difficulties with authority.

I’m not really thinking so much of interpreting but just someone there to ‘hold his hand’ in a metaphorical sense – is that a useful thing to do?---What I am meaning is that in this kind of situation, having observed many, many situations of an authority nature with Aboriginal people the fact that it was another Aboriginal person present would not necessarily give confidence to the person charged because he would see that person as being somewhat un-knowledgeable about and helpless in the face of European authority. I think it would have to be a European person and the people have in fate indicated this kind of thing – they need European people known to them to help them in these European culture situations.
Interestingly the categories of suitable prisoners friends set out in the second guideline while not being exclusive suggest that Forster J accepted the evidence of Downing on this point. The categories were a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer of the Department of Aboriginal Affairs.

I should mention that the Judge did not accept Downing’s evidence that it was impossible for him to explain the caution in language stating in passing that he thought him too emotionally involved to be reliable on that point. In my experience the ‘prisoners friend’ (who may also be the interpreter) is almost always not the type of friend referred to but an aboriginal person known to and asked for by the person to be questioned. In R v Butler (No 1) 102 FLR 341 at 343 Kearney J quoted the Prisoners friend guideline and added (at 344) his own observations.

*I consider that it is desirable that a ‘prisoner’s friend’ should possess other qualities as well as those emphasized above. He should be aware of the respective rights and duties of the police and of the suspect in that interview, so that he can ensure that the suspect is aware of the possible consequences of the answers he gives. He should be seen to be independent of the police and have a temperament such that he is not himself intimidated by the interviewing environment. He should be able to speak the suspect’s principal language. There will usually be practical difficulties in obtaining the services of people with all the desirable attributes. In any event, the choice of the ‘friend’ is for the suspect alone, not the police, though the police may assist in securing the services of a ‘prisoner’s friend’, if expressly requested to do so by the suspect: see Gudabi v. The Queen (1984) 1 F.C.R. 187 at 199-200. The Commissioner’s General Orders Q2.8, 2.9 and 2.16 provide suitable instructions to interrogating police officers in relation to the ‘prisoner’s friend’.*
It is difficult not to feel a little sorry for the detectives interviewing Russell Cotchilli [2007] NTSC 52 with both a prisoners friend and an interpreter both fluent in Kukatja (the interviewee’s language) who cajoled him to tell the story and overrode his will when he had chosen to remain silent. The detective had no idea what the discussion in language was until the electronic recording was translated. Justice Mildren rejected the admissions as not shown to be voluntary because the questioning continued after the suspect had chosen to remain silent which, of course, is contrary not only to guideline 8 but the common law. It is a little surprising that applications to reject evidence of confessions on the grounds of non-compliance with the Anunga Rules continue to crop up. I collected 32 cases in my research including one handed down only a few weeks ago.

HOW WERE THE GUIDELINES RECEIVED?

In the well known case of Coulthard v Steer 12 NTR 13 Muirhead J in a schedule set out the intemperate remarks of a Magistrate about the Anunga Rules and they don’t need repeating here. Suffice it to say that His Worship considered that the Judges lived on another planet and that the guidelines would unnecessarily hamper police investigations and lead to a mass exodus of white people from the Centre. Later the same Judge in the case of Bob Dixon Jabarula (1984) 11 A Crim R 131 had this to say: (132)

> It is almost eight years since what are now known as the Anunga guidelines were enunciated by the Chief Justice of this Court in Anunga (1976) 11 A.L.R. 412. They were enunciated because the court recognized the very real disadvantages of so many of the Aboriginal people in this Territory when confronted with an authority figure such as a policeman. It is recognized also the difficulties the police experienced in satisfying the courts that confessional material obtained was voluntary which involved proof that the defendant truly and fully comprehended his right to speak or remain silent.
In Coulthard v. Steer (1981) 12 N.T.R. 13, which was an appeal against a decision of the same magistrate, I endeavored to set out the importance of the guidelines and the necessity that they should be borne well in mind by the police and courts of summary jurisdiction. They have gained wide acceptance in this Territory and elsewhere, they have received the approval of courts of superior jurisdiction. They were recently treated as containing critical criteria for admissibility by the Federal Court of Australia in its appellate jurisdiction: see Gudabi (1984) 1 F.C.R. 187, and my own experience is that they have served as a guide to promote a high level of fairness and efficiency in the course of police investigation in this Territory. Understanding of the guidelines and general adherence to them has promoted the interests of justice in this Territory, where the courts are continually dealing with Aboriginal people of varying degrees of sophistication. Anunga made no new law which intruded upon authoritative decisions as to voluntariness or fairness. The guidelines were merely designed to ensure that those who by reason of their ethnic origins, by reason of their separate cultures and traditions, and by reason of embarrassment or fear would not suffer disadvantage in their dealings with the law.

CHANGES IN THE LEGISLATIVE AND ADMINISTRATIVE LANDSCAPE.
Among many legislative changes, section 139 of the Police Administration Act (NT) has provided for the electronic recording of admissions or confessions for any offence for which the maximum penalty is imprisonment in excess of two years. Section 142 renders evidence of a confession or an admission inadmissible unless

(a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or
(b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded.

And the electronic recording is available to be tendered in evidence.

The days of the verbal have gone along with the type up.

**UNDERSTANDING THE CAUTION**

Although Jim Downing’s evidence that the caution was impossible to translate linguistically or culturally was rejected by Forster J the need for an interpreter in any case where the person was not as fluent in English “as the average white man of English descent” is clear from guideline 1. At the time of the trials under consideration here there were very few people capable of interpreting the languages of the centre and probably most of the 15 major languages generally spoken in the Territory. Thus it was seen as a practical problem to be rectified as noticed in Jim’s evidence. The guidelines applied not only to aboriginal but to “the interrogation of migrants be they European or Asiatic.” There are Aboriginal Interpreter services in both Darwin and Alice Springs and Interpreter and Translation services for a very wide range of non-English, non Aborigina languages. The Aboriginal Interpreter Service has over 400 active interpreters able to interpret in the 15 major languages plus 104 languages/dialects including some secret languages. A good number of them are accredited to interpret in court but for police interviews accreditation is not required. An interdepartmental report containing comments from agencies in 1980 had the police asserting that interpreters were not needed on Groote Eylandt as “apart from a few old people everyone spoke English.” That was not my experience as the rostered magistrate there.

Anecdotal accounts of the percentage of aboriginal persons refusing to answer questions once the standard caution is broken down and the interviewee can explain piece by piece the right to silence varies from about 50% in the Centre (Dr Nanette Rogers) to 85-90% in the Top End. (Dick Wallace). To quote him “It seems to me that 85-90% of aboriginal suspects exercise the right to silence – more than
whitefellas do. That’s some sort of change.” Melanie Little advised me that “there has been an increase in the number of cases with trained interpreters being present at EROI’s in recent years.” She observes that the role of the prisoners friend is still not well understood. This is a recurring theme in many of the cases where the analogy of “a stick of furniture in the room” crops up. It seems a favourite with Johnny Lawrence.

**POLICE TRAINING**
I mentioned at the outset that a police officer at a reception suggested Anunga was but a footnote to the general treatment of voluntariness. I have been given the course notes for recruit training and Justice Riley’s lecture notes in the course for detectives. They are comprehensive and refer to the detailed plain language incorporation of the Anunga Rules as directions into Police Standing Orders. I agree with Muirhead J’s observation in Bob Dixon Jabarula that the directions are suitable. The rejection of confessions or admissions for non-compliance with the Anunga Rules to a large extent reflects laziness or incompetence rather than anything resembling the ‘type them up and lock them up’ practice of the 70’s. There has been a seismic shift in training and culture.

**CONCLUSION**
In 1975 the widespread but not universal police culture regarded the right to silence as an inconvenient formulation of words to be put to an aboriginal person followed by “Do you understand that?” The answer was almost always “Yeah”. The evidence of Jim Downing was evocative of the words of the Full High Court in *The King v Lee* (1950) 82 CLR 133 at 159;

> It is, of course, of the most vital importance that detectives should be scrupulously careful and fair. The uneducated – perhaps semi-illiterate – man who has a ‘record’ and is suspected of some offence may be practically helpless in the hands of an over-zealous police officer. The latter may be
honest and sincere, but his position of superiority is so great and so overpowering that a ‘statement’ may be ‘taken’ which seems very damning but which is really very unreliable. The case against an accused person in such a case sometimes depends entirely on the ‘statement’ made to the police. In such a case it may well be that his statement, if admitted would prejudice him very unfairly. Such persons stand often in grave need of that protection which only an extremely vigilant court can give them. They provide the real justification for the Judges’ Rules in England and the Chief Commissioner’s Standing Orders in Victoria, and they provide (if we are able to assume that the requirement of voluntariness is not enough to ensure justice) a justification for the existence of an ultimate discretion as to the admission of confessional evidence. The duty of police officers to be scrupulously careful and fair is not, of course, confined to such cases. But where intelligent persons are being questioned with regard to a murder the position cannot properly be approached from quite the same point of view.”

So here we are 33 years after Anunga and far from the Rules being a footnote to a general treatment of voluntariness in the police training they have played a key and enduring role in preserving and enhancing a vital right to choose to speak or be silent. Only two weeks ago Justice Thomas excluded admissions allegedly made by an aboriginal woman with a significant speech defect before the EROI and not confirmed during the electronic recording because the questioner forgot and because there was no satisfactory evidence that she understood the caution. If the rules can be a legacy of Jim Downing’s passionate advocacy of a fair go for aboriginal people in the hands of the police then they have done legion service. That Barker and I were able to expose the practices was in the end the product of persistence. It was all very interesting.
This conference is concerned with the erosion of rights but in this instance the legal system and the legislation has been active in the preservation of rights. Dean Mildren gave a paper at the fifth biennial conference in 1995 ‘Redressing the imbalance against Aboriginals in the Criminal Justice System’ now printed in volume 21 of the Criminal Law Journal, page 7. The matters he raised still deserve attention but the extent of the exercise of the choice to remain silent has amazed me and no doubt shows the campaign begun by Geoff Eames has indeed worked great change. I hate to think how many typed up suspects languished in gaol for offences they didn’t commit but I am confident that the old police culture is, if not dead then terminally ill. The much more effective investigative tools including DNA Analysis and better training have lessened remarkably the perceived need to get a confession by any means. This is a good result.

I have attached a list of the cases researched in case readers wanted to follow through judicial analysis. It is not claimed to be exhaustive.
**CASE LIST (in date order)**

1. R v Anunga and others R v Wheeler and Others
   (1976) 11 ALR 412

2. Collins and Others v R
   (1980) 31 ALR 257

3. The Queen v Clevens (ACT Supreme Court)
   (1981) 55 FLR 453

4. MacPherson v The Queen
   (1981) 147 CLR 512

5. Coulthard v Steer
   (1981) 12 NTR 13

6. Gudabi v R
   (1983) 52 ALR 133

7. Bob Dixon Jabarula
   (1984) 11 A Crim R 131

8. MD (a child) v McKinlay
   (1981) 31 NTR 1

9. R v Narula (Full Court, Victoria)
   (1987) VR 661

10. R v W and Others
    (1988) 2 Qd R 308

11. R v Butler (No. 1)
    (1991) 102 FLR 341

12. R v Butler (No. 2)
    (1991) 102 FLR 350

13. R v Anderson
    (1991) 105 FLR 25

14. Rostron v The Queen
    (1991) NTLR 191

15. R v Williams (WA)
    (1992) 8 WAR 265

16. R v Ninnal
    (1992) 109 FLR 203
17. R v Maratabanga
   (1993) 114 FLR 117

18. R v Weetra
   (1993) 93 NTR 8

19. Henry Charles Webb (WA Full Court)
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