Story Telling: Silence and Voice-Hope, Trust, Knowledge-Reflections on Aboriginal Heritage Legislation

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Storytelling, Silence and Voice

Abstract

Despite recent recognition by Prime Minister Rudd of Australia’s ancient heritage, Indigenous heritage protection legislation fails to take account of the oral tradition of that heritage, held in story known only to certain Aboriginal people.

Such legislation raises important issues concerning storytelling, voice and silence.

Foucaultian analysis notes that the silences of the powerful can control but more often the excluded are silenced. Voice is a primary mechanism in the management of trauma as recognised by the Bringing Them Home report (1997). Storytelling reverses silence and is core to organising the world and creation.

This paper examines the Victorian Aboriginal Heritage Act, noting that it ‘quiets’ Aboriginal voice and fails to properly recognise that, unlike Western heritage, Indigenous heritage is largely evidenced through oral traditions of storytelling. Reliance on an archaeological ‘bones and stones’, ‘expert’ evidence approach essentially misses the point. It concludes that new approaches are urgently required.

Keywords


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As Prime Minister Rudd recently acknowledged, Australia’s Indigenous cultural heritage represents the oldest continuing culture in human history, an antiquity stretching back thousands of years through the dreamtime.

This paper, by a white female Melbourne environmental planning law specialist, examines legislative protection of that heritage through the Aboriginal Heritage Act (Victoria) 2006 (AHAct). AHAct’s purpose is:

“to provide for the protection of Aboriginal cultural heritage in Victoria”.

Objectives include to:

- “accord appropriate status to Aboriginal people with traditional or familial links…”
- “recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage”.

Unlike western heritage, based in documentation and built form, Indigenous heritage is largely narrative, an oral history mixed in intimate connection with country. Thus, AHAct raises important issues concerning storytelling, voice and silence.

This paper divides into two parts. Part I examines theoretical aspects of knowledge, silence and voice. Part II relates theory to selected AHAct provisions.

**Part I - Theoretical Aspects**

**Knowledge**
“(T)raditional knowledge is developed from experience gained over the centuries and adapted to the local culture and environment, and transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, artistic expressions, proverbs, cultural events, beliefs, rituals, community laws, languages, agricultural practices...” (World Trade Organisation 2005)

Knowledge is the heart of Indigenous heritage. Possessing knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the knowledge is concerned. Although Dodson & Barr (2007) identify the use of terms such as ‘Indigenous knowledge’, ‘traditional knowledge’ and ‘Indigenous heritage’ in different contexts with different meanings, they question attempts to define cultural heritage.

Foley (2005/2006) notes that the Elder, as traditional keeper of knowledge, has lost control of the knowledge gate keeping process. Patience is not a virtue recognised in a postcolonial gluttonous knowledge search. According to Foley, it is wrong to assume cultural or traditional knowledge is internally coherent, primitive or belonging in the past and independent of other traditions. He considers, innovation, invention and new knowledge are internalised within traditional cultural knowledge systems which continuously evolve and adapt to change.

Weiner (1999) posits that cultural heritage legislation protects a product that derives from Indigenous people explaining to a Western ‘expert’ who applies his notions of tradition. Weiner sees this as a collusion to suppress differences between anthropologist and Aboriginal
and part of a “global politics of identity”. He too questions assessment of Indigenous ‘knowledge’ divorced from social practice.

Legislation such as AHAct assumes that access to Indigenous knowledge is an entitlement - as if it were part of a global commons or a library to which experts can, at will, refer. But Indigenous people traditionally must choose to share or not share knowledge. Whether something is ‘secret’ depends upon a complex Indigenous system of rights to information, including the right to know, hear or speak. Higher levels of knowledge often will only be revealed late in legal proceedings if all else fails. While it is rare for non-Indigenous Australians to be called upon to publicly justify their religious beliefs, Aboriginal people must frequently do so, often in the face of skepticism.

**Silence – Storytelling and Voice**

There are many ways to conceptualise ‘silence’ including:

- not speaking, writing, being present or being heard;
- being ignored;
- speaking or writing ephemerally or without authenticity, confidence or authority; and
- quieting … censorship, suppression, marginalisation, trivialisation, exclusion, ghettoisation, and other forms of discounting. (DeVault 1999)

Foucault theorises three interrelated “silencing” controls:

1. physically dividing or separating
2. scientific classification through language
3. self-control - people acting on their own bodies, souls, thoughts or conduct (Foucault 1982).

Silence can operate so that the silences of the powerful are used to maintain control, with change located in the language of the excluded and the losers. However, it is the voice of the excluded that is often silenced. In Australia, silence exists around many matters Indigenous, including its philosophical standpoint, language and knowledge systems.

Silences exact a terrible toll in depression, severed relationships and missed opportunities for learning and goal achievement. Seemingly small change - sympathy, listening, ensuring individuals do not self-silence – has profound positive effect. Voice is a primary mechanism in the management of past trauma. The Bringing Them Home report (HREOC 1997) concluded that to achieve healing for the Stolen Generation, testimonies must continue to be recorded. It urged adequate funding. Storytelling reverses silence. It both gives voice and is a type of voice. Storytelling, including giving voice to self, is core to formation of positive imagery and to creation. Cognition itself can be seen as discourse that the mind carries on with itself. The inner dialogue functions as an inner dialectic between positive and negative adaptive statements and one’s guiding imagery is an outcome of such an inner dialectic. (Cooperrider 2001) Narrative is a way of organizing, coping with, even acting on the world. (Scheppele 1989)

Revelation of Indigenous heritage knowledge through storytelling is closely tied to trust. Trust is the willingness of a party to be vulnerable to the actions of another expecting that the other will perform a particular action important to the trustor irrespective of the trustor’s
ability to monitor or control that other party. Well-developed inclusive structures, with procedures perceived to be structurally and interactionally fair, best engender trust in organizational environments.

**Legal Narrative**

Voice is core to interface with the western legal system. It is the way evidence occurs and individual rights are articulated. It is analogous to storytelling and replaces silence. Judicial acceptance cannot *ever* match evidence against the real world – all is story. Those whose self-believed stories are officially transformed into *fact* by the legal system contrast with those whose stories, still sincerely believed by themselves to be true, are officially distrusted or not heard. Those not believed live in a legally sanctioned “reality” that clashes with their perceptions. Thus, the experience of justice is intimately connected with one’s perceptions of “fact”. (Schepele 1989).

A New Zealand case illustrates this:

> “Those in the iwi entrusted with the oral history of the area have given their evidence. The (lower) Court complained it was bereft of ‘evidence’ and had ‘assertion’ only… The evidence was given by koumatua based on the oral history of the tribe. What more could be done from their perspective. The fact that no European was present with pen and paper to record… could hardly be grounds for rejecting the evidence.”

*(Takamore Trustees v Kapiti Coast District Council 2003)*
The physical body itself carries meaning. Before a person speaks, bodies elicit feelings of excitement and admiration, attraction and desire, envy and distaste (Sinclair 2001). This starkly contrasts with objectivity and rationality.

In many ways the concept of ‘story’, with its plethora of meaning to Indigenous heritage, is a form of discourse. Loosely defined, discourse is how something is presented or regarded. It is never neutral, having power implications for the object of which it speaks and forming what is held as knowledge or truth. In Foucault’s terminology, “discourse” includes proscribing practices including:

- research and analysis methods
- theoretical points of departure
- ontological and epistemological premises. (Ahl 2006)

According to Foucault (1982), foremost in shaping the research process are unquestioned assumptions, including the silences of the powerful. What is excluded, ie silenced matters, is perceived as irrelevant. Legitimacy, who is allowed to speak on the subject and via what channels, is important to outcome, along with the degree of institutional support enabling and restraining. Each field has its foundational texts that shape later discourse. The law, bound by precedent, is strongly tied to earlier texts and tightly proscribed by rules of evidence. The boundaries of legal narratives are shaped by legal habit.
Where does a story begin? Altering the boundaries may create a broader context within which outsiders’ stories, otherwise bizarre, may be understood sympathetically. The beginning influences how the story pulls in the direction of the legal outcome.

What is the ‘true’ story? Truth is a property of an account of the event. On the objectivist view, the observer of the account should not matter because the truth will remain unchanged. But observers bring a formed conceptual scheme, a set of presuppositions. The presence of different versions does not mean someone is lying. Often it is in differing stories that the heart of dispute lies. Because the story is held by the Indigenous person and told as their “truth”, often it is that person, ie the ‘researched’, who determines what knowledge emerges, particularly because Indigenous protocols of respect and understanding dominate. Where dialogue is valued, it represents a joint creation of a world, a jointly imagined projection of human and social possibility. Heidegger (1977) urges us not only to acknowledge our own place in history, but to be future-oriented, seeing future in a unity with past as having-been and present.

Courts, being removed from political and electoral pressure, provide an important public forum in which to assert rights, challenge the State, publicise issues, educate the community and effect change. They can break silence by listening and articulating value. However, the “Australian non-Indigenous legal system is only at a very primitive stage in its approach to Indigenous legal systems. Working out a satisfactory approach to ascertaining the content of an oral tradition will not be easy. Doing so without having significant effects on Indigenous legal systems themselves will be even more difficult. Only by recognising differences and
determining to accommodate them to the greatest possible extent can we hope to succeed.”
(Gray 2000)

Part II - Aboriginal Heritage Act

Broadly, AHAct requires neither developer, bureaucracy, government nor judiciary to render itself vulnerable. Whilst creating an Aboriginal Heritage Council, it constrains and supervises Indigenous input to the action of Aboriginal people and so fails to a fundamental principle of trust. This paper focuses on only four AHAct elements – cultural heritage significance, Registered Aboriginal Party (RAP), development approvals and Victorian Civil and Administrative Tribunal (VCAT).

What Knowledge?

“Cultural heritage significance” includes “significance in accordance with Aboriginal tradition and archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance”. Certain places are prima facie areas of cultural heritage significance, eg land within 200m of a waterway, highwatermark, waterhole or natural spring.

Strangely, “cultural heritage significance” is tied to ground disturbance! “Significant ground disturbance” means disturbance of … the topsoil or surface rock layer of the ground or a waterway by machinery in the course of grading, excavating, digging or dredging but does not include ploughing other than deep ripping”. Where land has such disturbance, it is mostly automatically excluded as an area of cultural heritage significance.
Categorising complex heritage via such earthy, mechanical means identifies an archaeological perspective. It silences a concept of Aboriginal heritage as the story of the land and its people, including the tangible, intangible and spiritual. It focuses on ‘bones and stones’, not the holistic humanist culture.

RAP

Aboriginal people must apply for registration! If unregistered they are not a compulsory part of the process. No appeal exists against registration refusal. A RAP must be a body corporate.

As of 13 February 2008, only four RAPs existed, applying to only a small part of Victoria and silencing Aboriginal voice over the balance of the State. A media release dated 9 May 2007 told Indigenous communities it is “Time to Step Up”. The weary, the jaded and the disillusioned may find this just more whitefella government demanding they jump through yet another hoop.

The only person not required to ‘step up’ and prove credentials is a successful native title holder. Linking heritage with native title legislation grossly ignores the many criticisms of the highly fraught native title process. There is no reason why native title parameters should govern Indigenous heritage protection.

Western legal discourse is exercising its ability to not only silence and control knowledge and value but selecting the voice(s) of ‘truth’. There exist many Indigenous people fully cognisant
of their country’s heritage who could actively and usefully inform the heritage process were they given voice.

**Land Use and Development**

**Cultural Heritage Permit (CHPermit)**

A CHPPermit authorises otherwise illegal development. A CHPPermit application must be referred to relevant RAP(s) but the Secretary, a non-Indigenous senior public servant, makes the decision. The only limit on his discretion occurs in respect of a secret or sacred object, human remains and, where a RAP exists, he must incorporate RAP requirements.

Aboriginal people are silenced by having no right to appeal the Secretary’s decision. By contrast, the developer can seek VCAT review. The parties to a developer’s review exclude an interested Aboriginal person or knowledge holder, but include a RAP (if existing) and the Secretary.

**Cultural Heritage Management Plan (CHMPlan)**

In areas of cultural heritage sensitivity or for any high impact activity a CHMPlan is required. “High impact activities” may include subdivision, construction, particular land uses and works. The CHMPlan assesses the potential impact of the proposed activity on Aboriginal cultural heritage.

Oral history is mentioned only in more complex assessments and is not mandatory to any form of assessment. Again the Act entrenches silencing. It clearly contemplates the possibility of completing even the most complex assessment without asking for or listening to
the stories or even locating and considering documents referencing such stories. The Act
states that a RAP must co-operate with a CHMPlan sponsor. By contrast, the sponsor’s only
statutory obligation is to “make reasonable efforts to consult with” a RAP – but only if the
RAP gave it proper notice.

The Voice of the CHMPlan

A CHMPlan is “a written report, prepared with the assistance of a cultural heritage advisor”.
This advisor must:

- be “appropriately qualified in a discipline relevant to the management of Aboriginal
cultural heritage, such as anthropology, archaeology or history; or
- have “extensive experience or knowledge in relation to the management of Aboriginal
cultural heritage”.

Again the Act silences the Indigenous voice. The very method prescribed by the Act for
protection of culturally significant heritage ‘steals it away’ from Aboriginal people, into the
hands of ‘experts’, more likely than not non-Indigenous. Again ascertaining oral history is
not mandatory even when the ‘expert’ is non-Indigenous. In contrast with the permit process,
the consultant is not even compelled to consult with the RAP, let alone a relevant Aboriginal
knowledge holder.

It is hard to see how any “truthful” cultural heritage assessment could possibly be made
without consultation with knowledgeable Aboriginal people, unless the area has already been
extensively considered and stories fully documented and reference made to these.
Where a RAP is consulted, fees are paid to it at the prescribed rate averaging $846/evaluation (Allen Consulting Group 2006). The AHAAct deliberately limits a group’s ability to set its own fee structures. Given the antiquity of heritage in Australia, it is difficult to know how anyone could, for $846, thoroughly assess even a small project, requiring checking the proposed CHMPlan, approaching knowledge holders and checking stories of the area’s heritage.

**VCAT**

VCAT is now the ultimate arbiter of many Aboriginal cultural heritage disputes in Victoria. For the purposes of the AHAAct, VCAT must include a member(s) with sound knowledge of and experience in Aboriginal cultural heritage. A Deputy President nominated by the President shall be in charge of assigning members. That Deputy President must have, “in the opinion of the President, special knowledge of the law in relation to a class of matters in respect of which functions may be exercised in the list”. “Knowledge”, “sound knowledge” and “experience” are not defined in either AHAAct or VCAT Act 1998. VCAT’s planning division will handle AHAAct matters although its routine work arises from vastly different legislation whose objectives include facilitating development and whose day-to-day work is the robust consideration of development applications. It is a body for dispute resolution, not exploration, discovery and enquiry. VCAT is not known to have any Indigenous member or particular past expertise in Indigenous matters. It will receive expert evidence from developer parties and necessarily rely upon that in the absence of any other. Non-Indigenous consultant archaeologists and anthropologists are actively marketing themselves as experts. VCAT is likely to be called upon to balance ‘expert’ and Indigenous evidence.
Conclusion

Despite its purpose and objectives, the legislative schema renders invisible the fact that the major element of Indigenous cultural heritage is knowledge held in story known to certain Aboriginal people. It invisible-ises methods of Indigenous knowledge transmission, ignoring rights to tell, to be told and to remain silent. It actively silences the voice of whole tranches of Indigenous knowledge holders. Insofar as Aboriginal people are concerned, its provisions are onerous, costly and afford greater rights to the developer.

Aboriginal voice is quieted. Those placed to objectively assess, will not be point-of-viewless. The evidence before them will almost certainly be incomplete.

There is need for alternative thinking concerning Indigenous heritage so as to appropriately value, treasure and protect it. Aboriginal heritage legislation must recognise that, unlike Western heritage, Indigenous heritage is largely evidenced through oral traditions of storytelling. ‘Bones and stones’ and ‘expert’ evidence essentially miss the point. Finally, interactionally fair procedures are fundamental to trust.

New approaches are urgently needed to create Rudd’s imagined future of an Australian antiquity fully known and acknowledged.

References


