Koori Cultural Heritage & the Struggle for Ownership and Control

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Introduction

This paper deals with the issue of Koori Cultural and Intellectual Property Rights (Koori Cultural Property Rights). It analyses the interface between Indigenous rights and the practice of Archaeology, and examines the issue of ownership and control. The paper focuses on Victoria as a case study in heritage politics and the Koori Heritage Working Group’s (KHWG) attempts to bring heritage laws into line with customary law, and human rights principles. These principles are used as a framework for assessing whether Australian Anglo laws recognise Koori rights, or whether they perpetuate the domination and control of Indigenous heritage by non-Indigenous interests. It is argued that Anglo heritage laws, that exclude indigenous ownership and control of their cultural property, reflect acts of Institutional Racism.

1. Human Rights Instruments

The human rights instruments that will be drawn on are; the Convention for the Elimination of Racial Discrimination (CERD) which will be used to assess the degree of equality that Kooris enjoy in the exercise and control of their heritage; the International Convention on Economic, Social and Cultural Rights (Article 15(1)(c)) which affirms the right of 'everyone' to benefit from the protection of moral and material interests; the International Convention on Civil and Political Rights which affirms the principle of self determination.
and the right of peoples to have control over their social, economic and cultural affairs; and the United Nations' Draft Declaration on the Rights of Indigenous Peoples (1997) (Article 12) which affirms the right of Indigenous peoples to have control of their cultural traditions and customs and to have their cultural property returned to them. Article 29 states that:

Indigenous people are entitled to the recognition of full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other generic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts.

The charter of rights that Indigenous people are asserting under Australian politico-legal systems is the right to:

1.1. Own and control Indigenous Cultural and Intellectual Property.

1.2. Define what constitutes Indigenous Cultural and Intellectual Property and/or Indigenous Heritage.

1.3. Ensure that any means of protecting Indigenous Cultural and Intellectual Property is premised on the principle of self-determination, which includes the right and duty of Indigenous peoples to maintain and develop their own cultures and knowledge systems and forms of social organisation.

1.4. Be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.

1.5. Apply for protection of Indigenous Cultural and Intellectual Property rights, which where collectively owned, should be granted in the name of the relevant Indigenous community.

1.6. Authorise or refuse to authorise the commercial use of Indigenous Cultural and Intellectual Property in accordance with Indigenous customary law.

1.7. Prior informed consent for access to, use and application of Indigenous Cultural and Intellectual Property, including Indigenous cultural knowledge and cultural environment resources.

1.8. Maintain the secrecy of Indigenous knowledge and other cultural practices.
1.9. Benefit commercially from the authorised use of Indigenous Cultural and Intellectual Property, including the right to negotiate terms of such usage.

1.10. Full and proper attribution.

1.11. Protect Indigenous sites including sacred sites.

1.12. Own and control management of land and sea, conserved in whole or part because of their Indigenous cultural values.

1.13. Prevent the derogatory, culturally offensive and unauthorised use of Indigenous Cultural and Intellectual Property in all media.


1.15. Preserve and care, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains, Indigenous cultural resources such as food resources, ochres, stones, plants and animals and Indigenous cultural expressions such as dances, stories, and designs.

1.16. Control the disclosure, dissemination, reproduction and recording of Indigenous knowledge, ideas and innovations concerning medicinal plants, biodiversity and environment management.

1.17. The right to control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, in the skill and teaching of culture (Janke, 1998: 46).

2. Definition of Indigenous Heritage

These rights form the basis of a National Declaration of Indigenous Cultural and Intellectual Property Rights that arose from consultations with Indigenous people. They also form the basis of a broader definition of cultural property that is inseparably linked to Indigenous land and identity. Indeed it is argued that they are one and of the same. A holistic view of the interrelationship between culture, land and identity sourced in Indigenous worldviews forms the basis of this analysis. Indigenous people view this relationship as an integrated way of life and thinking that connects them with the land and all aspects of their cultural heritage (Janke, 1998:169). A definition of Koori heritage is summarised:

Indigenous Heritage consists of both the tangible and intangible aspects of the whole body of cultural practices, resources and knowledge systems that have been developed, nurtured and refined (and continue to be developed,
nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity, including:

- Literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- Languages
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna)
- Spiritual knowledge
- All items of moveable cultural property, including burial artefacts
- Indigenous ancestral remains
- Indigenous human genetic material (including DNA and tissues)
- Cultural environment resources (including minerals and species)

Having established a broad based working definition of Koori heritage and a charter of the rights being asserted, Australia’s performance in recognising and empowering Indigenous people as the rightful owners of their heritage can be scrutinised.

3. Indigenous Heritage in Whose Hands

Australian law has taken a very narrow, Anglo centric and institutionalised approach to translating Indigenous customary and International principles into domestic law. Laws providing for the protection of Indigenous heritage are divided between different national and International jurisdictions. They embrace land, copyright, design, trade practices, customs, conservation, the national estate, and the environment. The patchwork of laws are administered by different government institutions.

Structure of Heritage Administration (Janke, 1998)

Each State has a Heritage Branch or its equivalent attached to the Public Works/Environment and/or Planning or Conservation Department, as well as officers responsible for Aboriginal Archaeological site management in
Land Management Departments and in the National Parks and Wildlife Services. Most of these branches have Archaeologists who are responsible for advising the government and private business on heritage matters, maintaining an archive of Archaeological research for the state, and keeping a register of known and possible Archaeological sites. Archaeologists are also employed to conduct research, surveys and excavation work on short-term contracts. Most of the personnel are trained in the Western academic tradition of the Archaeological sciences in which there is very little or in most cases no Koori input.

3.1 Distribution of Power

The most distinctive feature in all legislation is the amount of power that is vested in the relevant Ministers. Most Federal and State Legislation allows Koori and Islander people to request the Minister to make declarations for the protection of cultural property and the Ministers in all jurisdictions have discretionary powers to approve or veto applications. Victoria is marginally different in that some degree of control is given to local communities. Under s 21L(2), of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, (PART 11A Victorian Heritage Provisions 1987) (Clth.) the ownership of cultural property is held in a trust relationship between the Minister and local Koori communities. Section 21W provides for general meetings in which local communities can ‘provide advice’ or ‘make recommendations’ to the Minister for the ‘review or amendment’ of the Act (ATSIHPA, 1984 Part 11 A: 24).

In contrast to heritage laws in Queensland, New South Wales and Tasmania, some acknowledgment is given to Koori ownership rights in the preamble of the 1987 Act. This will be returned to for closer scrutiny. South Australia is the only other jurisdiction that has been prepared to relinquish some control insofar as the inherent rights of ‘traditional owners’ are concerned. The Minister is required to delegate powers to and consult with traditional owners on cultural matters. Whilst these provisions provide some empowerment to traditional owners it excludes a large section of Nungas (term for South Australian Aborigines) living outside areas defined as traditional (see relevant legislation in Bibliography; Boer and Brown, 1993: 18-40).

In all jurisdictions there are no statutory bodies for heritage administration, except for the Northern Territory where some ownership is recognised under the Sacred Sites Protection Authority. Section 6 provides that ‘ten of the twelve members are to be custodians of sacred sites’. A similar statutory body applies for Western Australia which vests responsibility for cultural property in the Trustees of the Museum subject to the direction of the Minister. None of the trustees however are required by the Western Australia Aboriginal Heritage Act 1972-1980 (W.A.), to be Aboriginal (Boer
While some authority is given to local communities and traditional custodians under the Victorian, Northern Territory and South Australian laws, the Ministers in all jurisdictions retain veto powers. As witnessed in the Alcoa (1980), Noonkambah (1980), Swan Brewery (1989), and Hindmarsh (1995) disputes, Indigenous Heritage values can often be compromised to cater for powerful economic interests. The evidence indicates that in most cases where there has been a conflict between Indigenous heritage and economic interests, Indigenous heritage rights have had to give way (Evatt, 1996: 9-11). This illustrates the amount of power and control Governments, politicians, and vested interest groups can exert over Koori heritage and the administration of the law when required. It also highlights how the Anglo legal system in most cases has not been able to fully address the injustices of land and cultural appropriation. The pressure applied to the courts particularly when inherent conflicts occur is exemplified in the above cases.

3.2 Heritage Advisory Committees

Many Heritage Advisory committees have been set up to advise the relevant Ministers on heritage matters. The Minister usually appoints them and there is nothing in any of the Acts requiring community selection. Indigenous heritage reform campaigner, Henrietta Fourmile, regards them as 'classic token Aboriginal committees' (Fourmile, 1989:51-52). Statutory bodies on the other have been empowered to make decisions independent of the
Minister. While they are subject to the Minister’s control and direction, the
overriding of a statutory body such as the Northern Territory Sacred Sites
Authority would invite rigorous political and public condemnation. Advisory
Committees can give advice, but it is the Minister’s discretionary powers that
determine the outcome of the advice, which is usually considered in the
context of the politico-economic factors of the day. In all jurisdictions
including Victoria there is no democratic process for the selection of advisory
committee members. They are usually selected from within the Government
agencies responsible for cultural heritage management and in most cases this
is done on a selective basis. Insiders, working within the system, are in a
position to influence selection processes and the notion of ‘door keepers’
(only opening the door to those who meet the insider criteria) play an
important part in the selection of governmental staff and advisory
committees (see Atkinson v State of Victoria (Department of Human
Services-Aboriginal Affairs Victoria (2000); Age, 16 July 1994).

3.3 Holistic Nature of Indigenous Heritage

As indicated, the management of heritage is spread across different
government departments. While this serves the interests of non-Indigenous
interests it has tended to dismember and fragment the holistic nature of
Aboriginal culture. One of the consequences of this process is the emergence
of a range of Indigenous programs within government structures which is
often equated with the concept of ‘silkworming’. That is, everyone seems to
be so preoccupied with setting up and maintaining their own programs that
they end up winding themselves into their own shells. Because of the
fragmentation that this creates, and as a survival mechanism, programs are
forced to compete against each other for funding which usually creates
conflict in the way resources are allocated. It also restricts natural growth,
and limits opportunities for cross-disciplinary skill development in cultural
resource management. Under these conditions the outcome is that many
programs fail because of the divisive and competitive nature of what are
imposed structures. This in turn effects the holistic and community based
nature of Koori heritage values (Aboriginal Cultural Heritage: Victorian

3.4 Mainstream Heritage Programs

By comparison it is relevant to look at the amount of resources and
empowerment that goes into maintaining European heritage. In Victoria
there are a number of different State cultural agencies that are funded by the
Department of Arts, Sport, Tourism and Conservation. Most are statutory
authorities that run their own programs. In other words they have been
empowered to a position where they practice the principle of self-
determination. The main bodies are: National Gallery of Victoria, the
National Trust, Public Records Office, Victorian Arts Centre, Film Victoria,
3.5 The Heritage Industry

The complex laws and processes that Indigenous communities have to weave their way through in order to gain protection and to seek relief for damage and exploitation has created the ‘heritage industry’. The industry sustains itself on the disparate nature of heritage administration in which there is little conformity between State/Commonwealth and International heritage regimes. Some states have attempted to bring Indigenous heritage values within the confines of the colonial heritage and others have attempted to claim Indigenous heritage as the domain of the Archaeological sciences. The assumption that Indigenous heritage belongs to all Australians has been challenge as a convenient myth, similar to those that were used to deny Indigenous occupation and ownership of land and resources (Bartlett, 1993:9). Cultural appropriation is synonymous with the ideology of land theft (Fourmile, 1989:45-61). Roslyn Langford’s article ‘Our Heritage Your Playground’ is a graphic illustration of how western ideological constructs have been used to claim Indigenous heritage. It also brings home the nature of the interface between Kooris and Archaeologists at the cutting edge of heritage reform (Langford, 1983:1-6; Bird, 1993:76-79; Victorian Ministerial Review on State Government Services: Aboriginal Cultural Heritage, 1991:29-56).

The foregoing analysis provides a context for examining the interface between Aborigines and Archaeologists and the reform strategies that Victorian Kooris asserted within contemporary Indigenous politico-legal processes. The Koori Heritage Working Group (KHWG) was given a community mandate, to negotiate with the Victorian Government for reforms that would entrench Indigenous heritage rights in law. The political strategies used by the Working Group to bring about reform and to gain self determination and equality in heritage management will be analysed.
4. Koori Heritage Working Group 1984-87

The KHWG emerged from a Statewide Heritage Seminar at the Aborigines Advancement League in 1984. Its mandate was to develop a Koori Heritage charter that would represent Koori rights to have control over their heritage including land (Koorier2 Newspaper, 1984:1-3; Koori Heritage Charter: Koorier2, 1984:14). To achieve this, the KHWG organised a series of Cultural Workshops at various locations of cultural significance in Victoria, to bring people together and to formulate heritage policies. These policies formed the basis of a ‘heritage charter’ that was used to negotiate with the Government on heritage reforms.

The main issues arising from the consultations were that ‘ownership and control’ should be returned to Kooris and that the ‘definition of heritage should be broadened’ to reflect Koori heritage values. The charter’s definition of heritage reflected the holistic concept of Indigenous heritage and the reality of cultural adaption and continuity. Not locking heritage into a time warp, and recognising the linkages between contemporary and traditional connections, were the key philosophical issues that underwrote the charter. The working definition of heritage that emerged from the KHWG consultations was consistent with that of the recent Report on Australian Indigenous Cultural and Intellectual Property Rights, by Terry Janke 1998:75). The definition included:
Those distinctive spiritual, material, intellectual and emotional features that together make up our present and past identity as Koori people. It is not just the arts, monuments and written works, but our way of life, our basic rights as human beings and our values, beliefs and traditions. This encompasses both physical and non-physical things like our tribal lands, sites sacred, significant and historic, burials, skeletal remains, artefacts, art, oral knowledge, language (verbal and non-verbal), ceremonies, documentary evidence and archival materials including genealogical information (KHWG Paper: ‘Koori Cultural Heritage is Self Determination’, Camp Jungai Heritage Conference, 1995:2; Koorier2 Newspaper 7th Edition July 1986; Fourmile, 1992:4; Madame Daes Papers: Protection of the Heritage of the Indigenous Peoples: United Nations Economic and Social Council, 1994:2-3).

Self-determination, sovereignty and substantive equality were the bottom line principles of the Charter. They were regarded as the guiding principles for any negotiations on heritage reforms, and substantive equality was the benchmark of equality being desired (Koori Heritage Charter: Koorier2 Newspaper, 1984).

4.1 Koori Politico-Legal Strategies

The KHWG acted as the main voice between the Koori community, Federal/State Governments, Archaeologists, and those institutions involved in heritage management. The Working Group’s political philosophy was strengthened by the framework of heritage rights, including the Declaration on the Rights of Indigenous Peoples, which at that time was still in its embryo

The KHWG challenged the existing status quo. Its first political strategy was to reject the Victorian Government’s ‘Aboriginal Cultural Heritage Victoria Discussion Paper 1985.’ The paper was one of the Labour Government’s policy commitments to Koori control of their affairs when it came into office in 1982. The paper was rejected because it did not address the fundamental issues of ownership and control, and its direction was being determined by vested interests rather than Koori rights. The KHWG was also critical of the draconian aspects of Archaeological and Aboriginal Relics Preservation Act, 1972 (Vic) that was designed to serve Government and Archaeological interests rather than Koori rights. The Act placed the ownership of Indigenous heritage in the crown, and offered token representation from Kooris on a ten person advisory committee of which there was one Koori member (Archaeological and Aboriginal Relics Preservation Act 1972 (Vic); McCorquodale, 1987:87; Warren, 1991:6-9; Bird, 1993:75-79; Boer and Brown, 1993:35-38; Fourmile, 1990: 57,61,62).

The discriminatory nature of heritage laws at that time and the extent to which they excluded Indigenous rights are summed up by Sharon Sullivan and Greta Bird. Sullivan argues that:

"they refer to the items which they seek to protect as relics; they lay down explicit and detailed conditions for archaeological research, especially for excavation; they set up advisory committees with exclusive or majority white membership, and with heavy archaeological input. None provides for any effective Aboriginal input, consultation or control. Ownership of sites and relics either resides with the present land owners or purchaser, or is claimed by the Crown. All Acts designate a government department, usually a museum or nature conservation service, to administer the Act" (Sullivan, 1985:14).

Greta Bird criticised the Anglo centric nature of the Victorian Relics Act 1972 (Vic). She argued that the Act served the interests of scholars trained in the European tradition rather than Kooris. The Act placed the control of sites and relics in the hands of the relevant Minister and the Director of the Museum of Victoria. Relics including skeletal remains could be lent to other institutions for scientific studies without consultation with local custodians. As will be shown, these exposures combined with the actions bought about by Kooris, became important catalysts for heritage reforms (Bird, 1993:75-76,136-137).

The Anglo derived heritage laws and their exclusion of Koori interests were further exposed from within the legal system. Justice Jenkinson in Onus v Alcoa of Australia Ltd (1980) (The Alcoa Case (1980), held that the
provisions of the Archaeological and Aboriginal Relics Act 1972 (Vic) gave
no guidance to the legal recognition of Koori rights, declaring that it was
directed to ‘facilitating the scholastic and educational activities of a Western
European Community planted on alien soil’ (Onus v Alcoa Australia Ltd
(1980)).

Politicians were also quick to take up the inadequacies that were being
revealed in the heritage laws. Race Matthews, shadow Minister for the Arts,
stated that: ‘It must be extraordinary to our Aborigines that the History,
Culture and Art of this race should automatically be entrusted to the care of
the people from a completely different background’ (Hansard, 1980: 7576).
The Hon. G.A. Sgro conceded that ‘it is the black people’s heritage not ours’
and claimed that ‘white people cannot be trusted anymore’ (Warren,

More than a decade later many of these criticisms are re-echoed by the
Council for Aboriginal Reconciliation. The Council asserted that Europeans
can no longer be the moral custodians of information about, or policies
towards, Indigenous Australians and, Indigenous rights to be the owners and
custodians of their own cultures must be recognised and not be subordinate
to non Indigenous interests (Council for Aboriginal Reconciliation, 1995;
Council for Aboriginal Reconciliation, 1994).

4.2 Aborigines and Archaeologists

The KHWG contributed to the heritage debate. They challenged western
schools of thought and raised questions about the ethics of Archaeological
research. Many of those ‘Cultural Protocols’ that now apply to the practice
of Indigenous research were at the heart of the debate on heritage issues. At
that time there were few substantial guidelines on the appropriate cultural
protocols, such as those exemplified by Dr Arthur Smith in Indigenous
Research Ethics, 1995, that needed to be observed (see Smith, 1995:8-12 and
Research of Interest to Aboriginal and Torres Strait Islander Peoples Report,
1999). Indeed it was very much a laissez-faire approach in which there was
little if any accountability to Koori communities for Archaeological research.
It was very much a relationship of the studiers and the studied and the
process was one of Koori interests being represented by others outside the
group (Said, 1995:335).

There was some willingness on the part of many Archaeologists however to
transcend past approaches and to develop a more co-existive relationship
with Kooris. This was bought about by the realities that confronted Kooris
and Archaeologists at the time in what was becoming a rapidly changing
political environment. Koori assertions of their heritage rights provided two
options that inevitably had to be confronted by Kooris and Archaeologists.
One was to continue in what was a potential battleground or the other was to
come together in a field of cooperation. The seeds of reconciliation were
already being sewn but whether this bought about the desired changes that
Kooris were pushing for is the key sticking point (Langford, 1983:5).

To assist in the reconciliation process a group of Kooris and Archaeologists
formed a body called ABARCH in 1985. ABARCH attempted to provide a
forum in which Aborigines and Archaeologists could come together and
discuss heritage issues. As a result of the unwillingness of some
Archaeologists to recognise that change was inevitable, and that Koori rights
were an integral part of their work, ABARCH attempts at reconciliation
were only short lived. Many Archaeologists, particularly those that carried
vestiges of the colonial mindset, seemed more concerned about maintaining
the status quo rather than developing a dialogue with Kooris. The case of
Roy Saintly and Tasmanian Aboriginal Land Council v Allen & Murray &
LaTrobe University (1995) highlights the intransigent often troubled nature
of the relationship. Olney J. found that Jim Allen and Tim Murray of the
Archaeology Department LaTrobe University had breached of s14 (1) of the
Tasmanian Relics Act 1975. Both held cultural materials of some 400,000
artefacts from a site in Tasmania which included food remains, stone and
bone tools, and shell artefacts and these were held against the wishes of the
Tasmanian Aboriginal community and against the request for their return
by the Minister responsible for the Act. The cultural materials were
‘removed without a permit’ and others were held under permits that
‘expired in 1991-1993’. The case illustrates the attitude of some
Archaeologists in that they not only transgress local protocols but also
attempt to circumvent appropriate legal processes. That is not the case for
Archaeologists generally but this particular case is an example of the mind
set of some Archaeologists that ABARCH was trying to reconcile (Tasmanian
Aboriginal Land Council v Jim Allen, Tim Murray and LaTrobe University,
Federal Court Victoria Justice Olney No VG 643 1995; Age, 12 June 1995:
Bonhomme, 1989; Berryman, 1983; Creamer, 1983:10-17; Sullivan, 1985:1-9

The changing political environment created different positioning between
Kooris and Archaeologists. In many ways it created a more coexistive
relationship and a better understanding between Kooris and Archaeologists,
and in some ways it had a polarising effect on those that found the bridge too
difficult to cross. From a Koori perspective however it was a valuable
exercise in that it raised the awareness of many Archaeologists who up to
that point had very limited if any contact with Kooris. As a result, many
Archaeologists bridged the gap and recognised the value of working together
with Koori communities on Archaeological projects. It was a steep learning
curve for all parties and one that put Koori rights on more equal footing
(ABARCH LaTrobe University, 1995; Bird, 1993:87-88; O'Keefe and Prott
1984:135-137; Langford, 1983; Sullivan, 1985: Creamer, 1983; Wilkes, 1985:
Other political strategies that helped to gain formal equality for Kooris in heritage matters took place in the courts. These were the cases of Onus v Alcoa of Australia Ltd (1980) and Berg v Council of the Museum & Ors (1984). These will be used to highlight the other reforms that were achieved on the politico-legal front by Kooris.

4.3 Using the Courts to Assert Rights

In 1984 Jim Berg challenged the legality of the Museum to lend relics to other bodies without the approval of the relevant authorities. The Archaeological and Aboriginal Relics Preservation Act, 1972 (Vic) gave the Museum powers to display and lend material in Australia and overseas but this could not be done without the approval of the relevant Minister responsible for the act and without consultations with the relevant Koori custodians (Bird, 1994:78). In Berg v Council of the Museum of Victoria and Ors (1984), the Museum argued that it had authority to lend relics under the Museums Act 1983, which was the official storage place of relics including skeletal remains. Berg argued that s20A of the Archaeological and Aboriginal Relics Preservation Act, 1972 (Vic) overrode the Museums Act, 1983 (Vic), and that Aboriginal relics must remain in the Museum unless the responsible minister agreed to their removal (Bird, 1994:80).

Justice Nicholson agreed that the Council of the Museum could not lend out Aboriginal relics without the express approval of the relevant Minister and granted an injunction to restrain the museum from making such loans (Berg v Council of the Museum of Victoria & Ors (1984) at 18; Bird, 1993: 18).

The other significant case that was brought before the courts under the same Act, was Onus v Alcoa, (1980-1981) in which the plaintiffs sought an injunction to prevent Alcoa from carrying out works on land that would interfere with Aboriginal Relics. The land at issue was part of the traditional lands of the Gournditch-mara to which the applicants declared that they were culturally connected as the descendants and custodians of the sites and relics in accordance with their traditional laws and customs. This was dismissed in the Supreme Court, but went to the High Court on appeal. The High court held, a decade before Mabo, that Aboriginal persons with an attachment to threatened archaeological sites had standing to enforce the Act against the government and third persons. An out of Court agreement was reached between the Aboriginal plaintiffs and Alcoa in which compensation was paid to the Aboriginal people concerned and no further litigation was necessary (Onus v Alcoa of Australia Ltd (1981) at 425; Aboriginal Law Bulletin, 1981:9-10; McCorquodale, 1987:345; Warren, 1991:8; Bird, 1993:360-366).

The two cases highlight some of the gains that were made in the 1980s under the Anglo legal system in relation to the recognition of Koori heritage rights.
Kooris used the courts to restrict the Museum’s control over Indigenous relics and were successful in gaining recognition of their standing in relation to cultural rights and traditional connections with the ancestral lands. In the broader politico-legal context these were very significant statements about the ‘ownership and control’ of heritage, and the prior ‘occupation and possession’ of land (*Mabo (No2)* 1992). It also bought home the fundamental importance of land and heritage to Koori identify and survival. The extent to which these gains have flowed on to Kooris in terms of substantive equality and empowerment will be returned to in the final analysis.

4.4 Skeletal Remains Debate

The skeletal remains issue that became the catalyst for Jim Berg’s actions needs to be revisited. It came to a head in 1983 when Koori Museum workers discovered that there were large collections of Aboriginal remains, stored in the Victorian Museum and some Universities. Many of them were part of what was known as the Murray Black Collection. The KHWG and the Museum Koori Liaison Officer were instrumental in eventually restricting the use of skeletal remains for scientific studies and public displays. The Koori community was successful in preventing the display of skeletal remains from Kow Swamp and Keilor at a symposium in New York in 1985. The Yorta Yorta raised the issue of the Kow Swamp cranium, in a letter to the President of the Museum Council in March 1984. The Yorta Yorta emphasised that they did not want the Kow Swamp cranium removed from the Museum or displayed anywhere let alone taken to New York. It was this action that became the catalyst for Jim Berg’s legal actions that followed in April 1984. Since then the Yorta Yorta have been successful in regaining control of skeletal remains and reburying them within the ancestral lands (Atkinson, 1984; Letter from Yorta Yorta Tribal Council, 13 March 1984; Sydney Morning Herald, 3 October 1984; Bird, 1993:81-84).

It was these events together with the continued assertions of Koori rights that challenged the existing status quo and helped to put Koori heritage rights on a more equal footing. In many ways it created a more coexistive relationship between Kooris and those Archaeologist who recognised that change was both necessary and inevitable. The reality is that many Archaeologists have transcended the binary positions and have moved on to a more coexistive relationship.

I will now examine the extent to which the reform measures that arose from the Koori consultations were incorporated into Victorian heritage laws.

From the KHWG community consultations there were three main issues on which the Government agreed to introduce reforms. These were Koori ownership and control of their Heritage and representation at all levels of Heritage Management. These were considered to be consistent with the
Government’s policy commitments to Koori control of their affairs (Relics Act Review Committee Report, 1986). As part of the Labour Government’s commitments to enacting new laws that were consistent with the agreed reforms, and would provide a more coordinated approach to heritage matters, it proposed to establish a Victorian Aboriginal Cultural Affairs Institute. The Institute would be an umbrella type organisation that would bring the different programs together under the one roof. The idea of the Cultural Institute was driven by the holistic notion of Koori heritage and the need to allow for cross disciplinary learning and the development of career opportunities for Kooris in the administration and management of their cultural heritage. Having all aspects of Koori Heritage housed under there one roof, rather than the fragmented approach previously mentioned, was the preferred option but whether this was delivered by the government of the day is the key question (Victorian Labour Party Policy on Aboriginal Affairs, 1982, 1985; KHWG Charter, 1984).

On the basis of the key principles of heritage reform the Minister responsible for Aboriginal Affairs, Mr Jim Kennan, made a commitment to Koori ownership and control over their heritage. He also promised other reforms such as: powers to enter into heritage agreements with land holders; a fully representative State-wide Aboriginal Heritage Council; control over the Aboriginal material in the Museum of Victoria and the Aboriginal Heritage section of the Victorian Archaeological Survey. Other reforms were for improved physical protection for sites and objects and the expansion of the powers and duties of inspectors and honorary wardens; revamped skeletal remains provisions to ensure that they could legally be reburied in accordance with local community wishes; increased penalties for damage and destruction of, and illicit trade in, Australian cultural items; and recognition of the historic, economic and spiritual significance in culture that still exists for Kooris (Victorian Government Media Unit, 1986).

The reforms gained by Kooris utilising existing politico-legal processes set the scene for Kooris to regain control of their heritage as a fundamental right. I will now analyse the Heritage Act, 1987 in relation to the previous Relics Act, 1972 and then examine what degree of control Kooris have gained.
5. Victorian Heritage Legislation 1987

When the new legislation was drafted in 1986 it was blocked in the Liberal/National controlled upper house. The Federal Labor Government was then requested under its constitutional powers of 1967 to make laws for the benefit of Aboriginal and Torres Strait Islander People, to amend the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cloth) to give effect to the Victorian Legislation. Ironically, if the Bill had been accepted in its original form, and passed by the state, it would have repealed the draconian Relics Act, 1972(Vic) and the Victorian Museums Act, 1983 (Vic). This would have enabled Kooris to set up a new statutory management structure for Aboriginal heritage in Victoria. Indeed it would have provided the desired option of the Koori consultations, which was for an umbrella structure that would embrace the holistic notion of heritage.

Attaching it to the Federal Act had some advantages but the amendments that were introduced were in line with the philosophy of the Federal Act that was a last resort measure. It was formulated in response to the infamous Noonkambah dispute and was based on Aboriginal heritage values of the Northern parts of Australia. Under the Federal Heritage Act the concept of ‘traditional’ Aboriginal communities was a generic term that applied to all Australian Aboriginal groups. While Aboriginal communities in the South Eastern Region observe traditional customs and observances, there are different cultural variations. As highlighted in Mabo (No2) 1992, Indigenous culture is not a frozen concept but one that has been continually adapting to changing circumstances. As long as the general nature of the connection between the Indigenous people and the land remain, Indigenous entitlements to land and culture continue in contemporary circumstances (see Mabo (No2) Deane, Gaudron JJ. at 58; Brennan and Toohey JJ at 66,292; Bartlett, 1993; Aborigines Advancement League, 1985:15-16; Langton, 1981a: 16-22; Cowlishaw, 1988: 88; Anderson, 1995:34-37).

The Federal Heritage Act incorporated the Victorian legislation by inserting a new Part 11A which would override the Victorian Relics Act, 1972. If there was any inconsistency with the Federal and State laws then the Federal Act would prevail in accordance with Section 109 of the Commonwealth Constitution.

Under Part 11A the operation and enforcement of the provisions are delegated to the Victorian Minister for Aboriginal Affairs. The Office of Aboriginal Affairs administers the Act, which at that time was part of the Department of Health and Community Services. The Office of Aboriginal Affairs established a Heritage Unit, which incorporated the Aboriginal section of the Victorian Archaeological Survey, and the Victorian
Archaeological Survey retained historic and maritime Archaeology (Interview with Victor Briggs, 1995).

5.1 Relationship between 1987 and 1972 Legislation

Part 11A provides a separate scheme for the protection of Aboriginal cultural heritage in Victoria but it does not exclude or limit the operation of the existing 1972 Act. There is often confusion between the two Acts and how they operate together. Any archaeological site or artefact which was not recorded before 1987 is covered by the State Act until such time as the local Aboriginal community recognises that site or artefact as an Aboriginal place or object that is of significance to Aborigines in accordance with Aboriginal tradition. The Federal Act will be applied once the local Aboriginal community makes that recognition. In all cases where the State Act is used, no action is to be taken which is not consistent with the Federal Act (Halsbury's Laws of Australia, 1991: 3672-3673; O'Neill and Handley, 1994:468; Bird, 1993:84; Warren, 1991:6).

5.2 Victorian Cultural Heritage Act 1987

Some of the major changes and reforms were drafted into the 1987 Act. However the issue of ownership and control of heritage were only recognised in the preamble. Local communities have some power to protect sites and objects but the Minister's permission needs to be gained for making a formal declaration. Local communities are ‘mostly Aboriginal co-operatives, all of which have some legal standing’ (Golvin, 1992:8; Warren, 1991:8; Bird, 1993:88-89; Fourmile, 1989:53).

Under s21U (4) the local Aboriginal community is the ‘main permission-giving body, with the statutory right to be consulted and informed of decisions and discoveries’ (Warren, 1991:8). This has given some degree of power to the local community and a sense of control over their heritage, which some Archaeologists are still finding difficult to accept. There are many other interest groups however that have recognised these provisions as matters of local cultural protocols (Allen, 1983; Mulvaney, 1985; Bonhomnie, 1989; Wilson, 1989; Berryman, 1983; Pardoe, 1990; Radio National, 1995).

The local heritage areas that were included in the schedule are based on traditional tribal territories with variations being made to cater for regional affiliations between groups (Christie, 1979:6; Koorie Heritage Trust, 1991:2; Cole, 1982:16; Tindale, 1974:131; Aborigines Advancement League, 1985:1-7). They were also adapted to fit into the communities that have emerged as the major service delivery organisations at the local level, which include cultural matters. The designated heritage areas were not set in concrete and there is provision for amendments and or changes to the regulations of the
Act. Section 21W allows for a general meeting of local Aboriginal Communities for the purpose of providing advice and making recommendations to the Minister on the operation of the Act, including its ‘review and amendment’ (ATSIHPA, 1984: 24).

5.3 Extent of Power given to Kooris

The most significant change in the 1987 Act when considered against the 1972 Act is the transfer of some power from academic and administrative bodies into the hands of Kooris. In relation to skeletal remains the Minister is required to consult with any interested local community, and to follow its directives in accordance with Aboriginal traditional beliefs on whether the materials should be returned to the community, or be left in the Museum until such time that they can be returned to the ancestral lands (ATSIHPA, 1984:11,20).

Where there is difficulty in finding the appropriate community for reburial purposes existing communities can assume the responsibility for the reburial and protection of remains. This is consistent with traditional beliefs and with contemporary concerns that all remains should be returned to their place of rest in accordance with Aboriginal tradition. Section 21Q(a) provides for the Minister to ‘return the remains to a local Aboriginal community entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition’ (Part 11A Victorian Cultural Heritage, 1987:11; pers comm Ella Anselmi, Gary Nelson and Colin Walker Cultural and Site Officers, Yorta Yorta Clans Group, 5 August 1995).

Under s21 (a)(b) the definition of heritage was broadened to embrace some of those tangible and intangible aspects of culture mentioned. Aboriginal Cultural Property means ‘Aboriginal places, Aboriginal objects and Aboriginal folklore’. Folklore means ‘traditions or oral histories that are or have been part of, or connected with the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs), that are of particular significance to Aboriginals in accordance with Aboriginal tradition’ (ATSIHPA, 1984:11-12).

5.4 Protection of Intellectual Property Rights- Oral Knowledge

This broader definition saw the establishment of the Koori Oral History Program in the State Library, 1987 that was set up to record and document oral knowledge from Victorian Kooris. In consultation with Koori communities it developed its own ‘Conditions Agreement’ which includes provisions for the protection of oral knowledge. The Agreement recognises that Aboriginal knowledge is owned by the providers of the recorded knowledge. Under the agreement the provider’s permission is mandatory for those wishing to access and use the recorded materials. The principles of the
Agreement are consistent with those now being developed in relation to the concept of intellectual and cultural property ownership rights, mentioned at the outset of the paper. It is argued that the 1987 Heritage Act Part 11A should be extended to deal with the concept of intellectual property including art works (Koori Oral History Program Brochure, 1988; Hawkins, 1995:7-9; Golvin, 1992:8).

5.5 Powers Under The 1987 Act

Aboriginal object means ‘an object (including Aboriginal remains) that is of particular significance to Aboriginals in accordance with Aboriginal tradition’. An Aboriginal place means ‘an area in Victoria that is of particular significance to Aboriginals in accordance with Aboriginal tradition.’ A Community area means, ‘the area in Victoria declared by the regulations to be the area of that community’. Local Aboriginal Community means ‘an organisation that is specified in the Schedule’. At present there are 28 Local communities listed in the schedule of the Act (ATSIHPA, 1984:12-31).

The Act has provision for the appointment of Indigenous Inspectors, Site Officers and Cultural Officers. There are no enforcement provisions however for Inspectors under the Act. Inspectors may make emergency declarations of places and objects and they can accompany police officers who have obtained a search warrant from a Magistrate.

The protection of Aboriginal places and objects by declaration is one of the key elements of the Act. Under s.21C, 21D, 21E, there are three types of declarations that can be made on application. These are Emergency Declarations, Temporary Declarations and Permanent Declarations of Preservation. An Inspector appointed under 21R of the Act may make emergency Declarations: or the Minister or their delegated authority under 21B. A Magistrate can make a declaration after application by a local Aboriginal community.

A declaration is made if the Inspector, Minister or Magistrate believes that the Aboriginal place or object is under threat and cannot be protected, and once made the ‘local Aboriginal community must notify any person who may be affected by the declaration’. An Emergency Declaration is for 30 days but the Minister may extend the period of the declaration to not more than 44 days (ATSIHPA, 1984:13-14).

As no mechanisms for actually protecting the place or object are specified, the value of an emergency declaration beyond clarifying its status is ambiguous. The Minister has the final say in making the declaration.
Under s21D a Temporary Declaration may be made by the Minister if an Aboriginal place is under threat of injury or desecration: after receiving advise from a local Aboriginal community acting independently or following any person's advise that a temporary declaration should be made; or on his or her own initiative.

If the Minister makes a Temporary Declaration for the preservation of an Aboriginal place or object, it must be made in writing. The Minister must set out the terms of the declaration, including the manner of preservation and control of access.

If the Minister refuses to make a declaration, the local Aboriginal community may ask the Minister to appoint an arbitrator to review his or her decision. Any person affected by a Temporary Declaration may also ask the Minister to review his or her decision. A Temporary Declaration remains in force for 60 days or a longer period, not more than 120 days, as determined by the Minister.

If under s21E a local Aboriginal community decides independently or following advise from any person, that an Aboriginal place or object should be declared in order to maintain the relationship between Aborigines and that place or object, the community may advise the Minister that a declaration should be made. The Minister acting on such advise or on his or her own initiative, may make a declaration of preservation if he or she considers that such a declaration is necessary for the preservation of the place or object.

A declaration of preservation must be in writing and must set out the terms of the declaration, including the manner of preservation, restriction of interference and control of access.

A local Aboriginal community under s21G. may have notices erected on or near an Aboriginal place or object that has been declared. A person authorised in writing by the Aboriginal community may enter onto any land, at all reasonable times, in order to place such a notice. The Site or Cultural Officer usually carries this out through the local organisation responsible for the heritage area in the schedule.

The Act provides for the compulsory acquisition of cultural property and the establishment of Heritage Agreements between Aboriginal Communities and owners of Aboriginal cultural property 21K. In subsection (1) of the Compulsory acquisition clause 21M. 'acquisition of property' and 'just terms' has the same meanings as in paragraph 51 (xxxii) of the Commonwealth Constitution.
Under 21U(1) it is an offence to willfully deface, damage, interfere with or do any act likely to endanger an Aboriginal place or object. The Act permits the defacing, damaging or interference with an Aboriginal place or object if the local community has consented in writing. If the local community does not refuse or grant consent within 30 days, or if there is no local Aboriginal community, the Minister may consent, in writing, to the defacing, damaging or interference. Section 21U(3,4,5) allows people to apply for the consent of the local Aboriginal community for the excavation of any Aboriginal place or for carrying out scientific research on Aboriginal objects in that area. A local Aboriginal community may consent in writing to the doing of an act referred to in subsection (1) or (3) in its community area and may in the consent specify terms and conditions subject to which the consent is given.

If the local Aboriginal community under subsection (4) does not refuse or grant consent within 30 days, or if there is no local community, the Minister may consent in writing to the excavation and may specify terms and conditions subject to which the consent is given. Consent cannot be granted however under subsection (5) unless the Minister has sought a recommendation on the matter from any person or body that in the Minister's opinion should consider the matter; and the Minister has considered any recommendations made and is of the opinion that, in all circumstances of the case consent should be granted (ATSIHPA, 1984:22-23)

Section 21P of the Act requires that a person who "discovers what they suspect to be Aboriginal remains to report their discovery to the Minister giving particulars of the remains and their location". A penalty of $500 applies for breach of this provision. Where it is determined that they are Aboriginal remains the Minister shall take reasonable steps to consult with any local Aboriginal community that he or she considers may have an interest in the remains, with the view to determining the proper action to be taken in relation to the remains.

Under s21Q (1) the Museum of Victoria is the official place of lodgment of relics including skeletal remains pursuant to s, 26(1) of the Victorian Museums Act 1983. The 1987 Act provides other options for the return of Aboriginal remains similar to the 1984 Federal Act. The Minister can return them to a local community entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition; or otherwise deal with them in accordance with any reasonable directions of a local community referred to above or; if there is or are no such community or communities, transfer the remains to a prescribed authority for safe keeping. Whatever option applies it is important to note that under s.21Q (2) nothing shall be taken to derogate from the right of any local Aboriginal community, or Aboriginal accepting possession, custody or control or any Aboriginal remains pursuant to this section to deal with the remains in accordance with Aboriginal tradition.
Under s.21X. if a local community has reason to believe that any Aboriginal remains held by a university, museum or other institution were found or came from its community area, the local community may request the Minister to negotiate with the university, museum or institution for the return of the remains to the community.

When one measures these changes against the Relics Act 1972 (Vic), they are an improvement. Some commentators who have lobbied for similar reforms in other States believe that the changes, which in effect broaden the definition of Koori heritage to include oral knowledge and relinquish some control to local communities, are commendable achievements (Fourmile, 1989:53; Golvin, 1992: 4-6; Warren, 1991:8-9; Bird, 1993:115-116).

6. Koori Employment in Heritage Management

While some authority has flowed to local communities, the ultimate decisions on the declaration and protection of sites and other provisions of the Act are still vested in the Minister. Some Koori people are involved in the management of their heritage in the Museum and the Heritage Branch but not many are in senior administrative positions. Very few are employed in the range of support staff required for heritage management such as lab technicians, curators, librarians, photographers, technical assistants, draught persons, researchers, and administrators. At the moment there is also no employment provision for those completing cultural heritage and Archaeology courses at Melbourne, Monash, Deakin, LaTrobe, Charles Sturt, Armidale and the Australian National University. There are significant numbers of Koori students doing pre and postgraduate studies in Archaeology and Aboriginal heritage and in cultural resource management. The relevant heritage institutions have made little if any commitment to the career interests of these potential Koori heritage workers. Furthermore in their self-determination policies, and responses to the key recommendations of the Deaths in Custody Royal Commission, heritage agencies have been very slow in providing opportunities for Koori graduates (see Recommendation 192 of Deaths in Custody Royal Commission, 1992 and Recommendation 11.6 of the Evatt Report, that the membership of Heritage Agencies should have a ‘majority of Aboriginal and Torres Strait Islander People’, 1996:33).

Finally as can be seen by the overlap, duplication, and lack of clarity in the operation of the 1972 and 1987 Acts, it has created something of an administrative nightmare. For those working in the field there is sometimes total confusion as to the application of the relevant Act and because of the complicated administrative arrangements involved, it often deters rather that encourages Koori cultural workers from using the Act (pers com with Indigenous Students doing Heritage Studies, 1994-95).
The issue of ownership and control, which were the agreed principles, were drafted into the preamble of the 1987 Act. The preamble to Part 11A in paragraph (c) reads ‘the Aboriginal people in Victoria are the rightful owners of their heritage and should be given responsibility for its future control and management’. Other important acknowledgments were made in relation to the ‘prior occupation of Victoria by Aboriginal people’. Fine sentiments as many would agree but the upshot was that the Commonwealth disassociated itself from these acknowledgments by inserting a disclaimer to the effect that it did not acknowledge the matters acknowledged by the Victorian Government (ATSIHP Act Part 11A Victorian Aboriginal Cultural Heritage 1987).

Statutory preambles however lack any legal force and can only be consulted as an aid to interpreting and or assisting in resolving any ambiguities in the formal parts of the Act. Many Kooris and Gubbas would agree that the intent of the preamble is a fine gesture but in reality it is only pays lip service to Koori self determination (McRae, Nettheim, Beacroft, 1991: 300).

The case for the recognition of ownership, prior occupation and cultural rights may be further strengthened by the Mabo judgment. Under Anglo Australian law the majority held that ‘in 1788 and thereafter Australia was not legally or in fact a vacant, non-occupied territory but was occupied and possessed by indigenous communities’ with cultural traditions of their own. The translation of pre-existing rights to land and culture into Australian law however, will ultimately be determined by what interpretation judges apply to the Mabo principles. Already we have seen that this is a slow and gruelling process for claimants (Yorta Yorta v State of Victoria & Ors (1995-2000); O’Neill and Handley, 1994:429; Aboriginal Law Bulletin, 1992:22; Warren, 1991: 7-8).

7. Promises Delivered?

From this analysis it is clear that Indigenous Australians do not practice the same level of equality in the enjoyment and control of their heritage as non-Indigenous Australians. It can be said that while the 1987 Act promised much for Kooris it still hasn’t delivered in terms of those basic Koori heritage rights. It has given some control but not the control that was promised in 1987. On the surface it seemed to offer a lot but on closer scrutiny it only provides negotiation, and mutual agreement procedures.

The Victorian heritage laws when viewed against the framework are clear examples of Institutional racism, a definition of which comes from the United Nations General Assembly description of racial discrimination, 1965. Article 1. Of the International Convention on the Elimination of All Forms of Racial Discrimination (UN General Assembly, 1965), to which Australia is a signatory, states:
‘In this convention, the term racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights, and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

7.1 Institutional Racism

Institutional Racism can thus be defined as behavior which is effected by an institution (rather than by an individual) representing one politically dominant group of people, which has the purpose or effect of ‘nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in their political, economic, social, cultural or any other field of public life, of another group of different racial, national or ethnic origin’ (O’Neill and Handley, 1994:357,334-346; Bailey, 1990:181,194-195).

Most commonly this behavior is manifested in a variety of often-subtle ways, for example, by virtue of a philosophy, a policy, or an administrative or legislative structure, which isolates or acts to the detriment of, or thwarts the aspirations of a group of people seen as belonging to a racial or ethnic category. The following examples demonstrate institutional racism.

Exclusion from, or an unequal pro rata, in terms of the general population by the representation of members of a designated racial group within an institution. An example is the near total exclusion of Aborigines working within the Victorian Public Service. Aboriginal and Torres Strait Islander peoples are five times less likely to be employed in the public service than other Victorians. One needs to also equate these statistics with the amount of Kooris employed in the management of their heritage. For example in 1999, out of the 24 positions located within the Heritage Branch of Aboriginal Affairs Victoria, there were no Kooris employed at senior management level. Those Kooris that were employed were subordinate to senior non-Aboriginal staff and worked in the technical and support sections. Some Aboriginal staff have worked in these positions for over 10 years with no upward career promotion (Aboriginal Affairs Victorian Heritage Services Branch Structure, 98: Aboriginal Affairs Victoria, 1995; Australian Bureau of Statistics, 1991).

The exclusion of Koori people from the teaching of their history and culture in Education Institutions. There are no Kooris employed as lecturers or tutors in Aboriginal Studies at LaTrobe University. Non-Indigenous people teach indigenous studies. The exclusion of Indigenous people from running and teaching Indigenous studies not only implicates them in institutional racism but through their actions they ultimately deprive students seeking
knowledge and input from Indigenous people (Ngariaty, 1993; Morton, 1995:32-33).

The exclusion of members of a racial group from control of institutions set up to serve their group, the ultimate power remaining with the politically dominant group. Cultural Affairs except for some small cosmetic concessions clearly falls within this form of exclusion, which is also consistent with the findings of the Deaths in Custody Royal Commission findings emphasised at the outset. The domination of Indigenous affairs including their heritage by non-Indigenous interests, when measured against the extent of Indigenous inclusion, has increased (Council for Aboriginal Reconciliation, 1995:71-72).

These examples illustrate how institutional racism manifests itself in contemporary Indigenous affairs. Its core feature is the denial of effective control by the people themselves over the institutions, or sections of them, which are purporting to serve Indigenous interests. Individuals who serve in such institutions and who come face to face with their clientele may not exhibit racist behavior at all, but because they are themselves subject to matters of policy, procedure, and the system itself over which they have little control or input, they are nonetheless complicit in acts of institutional racism (McConnachie, 1981: 69-71).

Conclusion

The struggle for Koori ownership and control highlights the underlying nature of Institutional racism. That is, those Government authorities and agencies including Aboriginal Affairs continue to act in a manner that nullifies and impairs the recognition, enjoyment or exercise, by Koori people of their cultural heritage, on an equal footing to that enjoyed by other cultural institutions (Department of Foreign Affairs and Trade, 1993: 111-112).

Assessed against the Heritage framework, the 1987 Act has not delivered those rights being sought, not to mention the idea of the one roof concept. The ideal of a Cultural Institute became lost in the process of status quo politics.

When considered against the amount of land and heritage that Kooris as the traditional owners have regained, Koori Heritage rights are still marginal to non-Indigenous interests. Victorian Kooris have been returned one hundredth of 1% of their traditional land base and have been given some marginal representation in the management and control of their heritage. From this analysis, Kooris are a long way from practicing and enjoying rights arising from customary and International law principles.
Perhaps Kooris place too much faith in the promises of Governments, and the question of self-determination and the recognition of customary law rights will be determined in the broader national and international political arena. It must be said however that the politico-legal strategies used by Kooris to bring about greater equality in heritage matters are significant achievements. They provide important foundations from which the momentum for Indigenous Heritage rights will continue to be asserted.

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