Reclaiming our Heritage & the Struggle for Ownership & Control
The Victorian Aboriginal Cultural Heritage Act, 2006-2020

Koori Heritage Working Group, 1982-87
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Background

While significant reforms to Cultural Heritage laws where achieved by Kooris in the 80’s that saw the enactment of the Victorian Cultural Heritage Act, 1987, this paper examines the changes that have taken place during the subsequent period to 2020. See Case Study of Koori Heritage in Victoria, 2000. A generational shift has taken place in the power dynamics of Victorian Heritage management, control and policy direction, and the question is whether the 1987 reforms have remained intact invites scrutiny. The 1987 Act acknowledged ‘Aboriginal occupation of Victoria’ and their ‘rightful ownership of their heritage’, and returned ‘responsibility for its future control and management’ to local communities. These hard fought reforms were achieved by the Koori Heritage Working Group KHWG and enacted into legislation on the basis of Self Determination and Community Control principles. Changes to the Victorian Aboriginal Cultural Heritage Act, 2006 and subsequent amendments in 2011, 2016 will be analysed to see whether these changes have built on the Koori reforms of the 80s, or been whittled away by Government deception. Acknowledging rights of ‘occupation of the land and ownership of heritage’ was a paradigm shift in reparative justice. Reclaiming basic human rights on the one hand and having them taken away in the other however is the underlying theme of the paper. The narrative of the paper is firmly grounded in an Indigenous epistemology and Traditional Owner world view-see Profile (PART 11A Victorian Aboriginal Cultural Heritage, 1987: Section (a) (c)).

The framework of the paper is guided by the definition of Indigenous Heritage rights sanctioned by the Commission of Human Rights, UNESCO, 1994. Consistent with the Indigenous world view of heritage rights, the Commission categorically declares Indigenous Heritage as:

‘Not merely a collection of objects, stories and ceremonies, but a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity. The diverse elements of an indigenous peoples’ heritage can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practice. Simply recording words or images fails to capture the whole context and meaning of songs, rituals, arts or scientific and medical wisdom. This also underscores the central role of indigenous peoples' own languages, through which each peoples heritage has traditionally been recorded and transmitted from generation to generation.’ (Dr. Erica-Irene Daes, Report of the Special Rapporteur: Protection of Heritage of Indigenous Peoples. E/CN.4/Sub.2/1994/31. Sub-Commission of Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, UNESCO, 1994. Para.8).
The Human Rights framework enshrines the fundamental belief that Indigenous people themselves are the jurisdictional voice for the ownership, control, administration and management of all aspects of their Cultural Heritage. No imported constructs of culture or preconceived notions of Aboriginality will ever change that reality. Listening to and acting upon Indigenous voices after decades of neglect and mistrust are a welcome call and a front line message now being advocated by Indigenous leaders in Australia?

The track record of past government failures, in Aboriginal Affairs administration and public policy has been called to account. The history of more than a century of imposed laws and policies has been challenged and Governments have been called upon to start ‘listening to community voices’. The uprising of Indigenous peoples calls for justice in the ‘Black Lives Matter’ protests adds further weight to the call for Governments to listen and to act upon Indigenous demands (The Age, 30th October, 2019; Liddle, C. The Guardian, 6 June, 2020).

This provides the structural framework for examining those questions raised and reflecting on the Heritage struggle in Victoria that brought us to where we are in 2020. The term Koori is used in reference to Victoria, and the Koori Heritage Working Group KHWG that was mandated to bring about those reforms to Victorian Heritage laws in the 1980s is featured as a key player in the narrative.

Victorian Heritage Act, 1987

Looking back it is clear that Victorian Cultural Heritage Act, 1987 was a revolutionary shift in thinking and strategic action that changed the power imbalance between Government control and Koori heritage entitlements. It marked a return to Indigenous cultural values and beliefs practiced and enjoyed since time immemorial, and it decolonised the Anglo-centric construct of Aboriginality that drove the racist Aboriginal Relics laws of the 70s (see-Archaeological and Aboriginal Relics Preservation Act 1972). While local communities were afforded some control, heritage campaigner Henrietta Fourmile reminds us of the reform outcomes in the broader context of Indigenous based and sovereign rights. Factoring the gains made during the reform period into the reality of the power dynamics of control, Henrietta argues that ‘ultimate authority for the ownership and control of Cultural Heritage stayed with the Minister’ (Fourmile, 1989: 47). From those changes to the regime of Aboriginal Heritage laws in Victoria, 2020, one can see clearly that the Minister retains overarching powers over all aspects of the Heritage program. The Minister has control of the process by which people are chosen to represent Traditional Owners, by selectively appointing members of the Aboriginal Heritage Council AHC including the Chairperson. In all heritage jurisdiction it is true to say that Ministers have total control including the power of veto over requests made for Heritage protection by the State, as evidenced in the Heritage Act and the case studies presented (ACH Act, 2006: Part 9, 130: Establishment of Council,p.131 (2) Membership).
While the 1987 Act provided greater avenues for negotiation, many important cultural rights were still effectively denied, supporting the claim that these restrictive legal systems within Government structures operate to maintain the status quo power imbalance between Koori rights and Government agendas. This was clearly identified in Elizabeth Evatt’s review of the Heritage laws in Australia. Ms Evatt found that while some authority is given to local communities and traditional custodians under the Victorian heritage laws, the Ministers in all jurisdictions retain veto powers. 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).

Since the Evatt review however there are many cases of Government neglect, inadequate protection laws and the destruction of sites of sacred value to Traditional Owners. The extent to which Indigenous rights have been ridden over roughshod by Governments and vested interests have been described as an act of 'betrayal' to Traditional Owners and our understanding of human history. Most blatant of these is what we have witnessed with the heartbreaking destruction of the sacred Juukan Gorge Rockshelter site Western Australia. According to the Australian Archaeological Association the early dates for occupation of Juukan are 46,000 BP (before present), which puts this site in the oldest bracket of dates for continued human occupation in the world. The Rockshelter is much older than those sites in Europe located in Northern Spain and Southern France, Altamira (36,000BP) and Lascaux (20,000BP). It is in honor and respect of their heritage values, and their significant contribution to human history that both are listed as World Heritage sites by UNESCO. Regardless of the loopholes that can be transgressed in the Heritage laws, to destroy sites, Archaeological societies believe that the duty of care rests on Rio Tinto who ‘neglected its own global corporate guidance on why cultural heritage matters guidance designed in part to compensate for poor legislation’ including ‘international industry standards concerning mining and Indigenous peoples that it was instrumental in developing’. One can imagine the public outcry if the same destruction was allowed to happen to UNESCO valued treasures and their story of global human occupation. That the destruction occurred during Reconciliation week makes it an even more blatant disregard for Indigenous-based rights to protection of their cultural antiquity (Australian Archaeological Association Inc, Press Release, June, 2020; Society for American Archaeology Letter to Minister for Aboriginal Affairs, Perth, 16, June, 2020; World Archaeological Congress, Statement June, 2020; Bradshaw Foundation: Exploring our Past Informing our Future; Altamira Cave).
The destruction of the Juukan site has caused much grief for the Traditional Owners, the Putta Kunti Kurrama and Pinikura people. The damage has evoked widespread outrage and calls for the West Australian governments to enact immediate reforms to their Heritage legislation. Just three days after the Juukan site, was blown up by Rio Tinto, the Western Australian Minister gave consent to BHP to destroy another 40 Aboriginal sites of up to 15000 years old. If Noonkambah was not enough in the 1980s, this is another example of the conflict identified in the Evatt report three decades ago. It is another act of willful damage on the part of the mining companies aided and abetted by the Western Australian Government and its Ministerial powers over the control of Heritage protection decisions. (Wilkinson,D. & Burnett, P. The Law Betrays the lore, so we’ll destroy our ancient heritage again. Sydney Morning Herald, 10, June, 2020; Allam, L. & Wahlquist, C. Guardian Australia, 11 June, 2020; Toscano, N. The Age, 3 June, 2020).

The ongoing and often violent clash between Indigenous rights to their heritage and vested interests is never ending. What we are seeing is the amount of power and control Governments, politicians, and vested interest groups can exert over Indigenous Heritage values and the administration of the law when required. Case studies of the clash between Victorian Koori rights to protect their cultural heritage from destruction by Governments demonstrate the underhanded way the power imbalance is acted out in the shameful scenarios witnessed. The Government’s proposed destruction of the sacred Djab Wurrung trees in Western Victoria to allow for road construction is another case in point, particularly when other options were available to avoid the desecration of significant cultural sites. Many other failures in Heritage protection laws have been witnessed in the Alcoa (1980), Noonkambah (1980), Swan Brewery (1989), Hindmarsh (1995) and Djab Wurrung (2019-20). Heritage disputes in these cases clearly demonstrate that Indigenous Heritage values can be
compromised to cater for powerful economic interests (see Koori Cultural Heritage and the Struggle for Ownership and Control, 2000, p.6).

Victorian Aboriginal Heritage Act, 2006

Responses to the reforms embedded within the 1987 legislation that gave greater power to Indigenous voices, led to the implementation of the Aboriginal Heritage Act 2006 (AHA). This was followed a decade later with the Aboriginal Heritage Amendment Acts 2011, 2016, all of which operate in the revised regime of Heritage Administration in Victoria in 2020 (The Parliament of Victoria, 2006; The Parliament of Victoria, 2016).

Aboriginal Heritage Council

While there are positive changes that have been made within the AHA 2006 and 2016 amendments there are still significant issues in the current legislation, which translate to practices that allow for the desecration and destruction of Koori cultural heritage values (The Parliament of Victoria, 2006). The 2006 Act established the Victorian Aboriginal Heritage Council (the Council), a body of Victorian Indigenous people not democratically elected by Traditional Owners but appointed by the Minister for Aboriginal Affairs. Under the AHA, 2006 part 9 the Council is empowered to the status of a body corporate delegated with powers to make decisions on Heritage matters. It is the central Coordinating body for ‘advising’ and making ‘recommendations’ to the Minister in relation to ACH in Victoria. It has additional functions in receiving and determining applications for Registered Aboriginal Parties RAPs and other matters referred to it by the Minister (AHA, 2006.Part 9 Administration. pp129-130). While all of the Council’s functions deal with Cultural Heritage matters the strength of its powers are reduced to the capacity of an ‘advisory body’ similar to the many other advisory structures in Aboriginal Affairs administration. There are no enactment clauses in the legislation that empower the Council to direct the Minister to enact decisions they have made in consultation with Traditional Owners. Like all Indigenous Advisory structures advise can be given but at the end of the day ultimate power is vested in the Minister and the Secretary of the Act who have the final say. The Secretary has wide reaching powers delegated by the Minister to ‘grant cultural heritage permits’ and to ‘approve cultural heritage management plans’ under section 65 of the Act (The Parliament of Victoria, 2006; Atkinson, 2000: 6-7).

The way in which power is distributed in the AHA 2006 and the defective process of establishing structures to administer the Act have faced criticisms from Indigenous communities in Victoria. The way in which the bureaucratic structures stipulated under the Act bolster Government power while limiting the autonomy of Traditional Owner groups
have been called to account by the Yorta Yorta Nation Aboriginal Corporation YYNAC in opposition to the draft bill, before it was legislated in 2005 (Yorta Yorta Nation Aboriginal Corporation). The YYNAC argued that the process whereby the Council is appointed by the Minister “removes any right for Aboriginal Peoples within Victoria to elect their own representatives to the Council” (Yorta Yorta Nation Aboriginal Corporation; Atkinson, 2006).

Concerns about the nature and composition of the Council were again raised during the Treaty debate in Melbourne, 2016-2020. The Council was singled out for its lack of transparency in not being democratically elected. It was challenged for its assumed role in representing the rights and interests of the estimated 38 linguistic/territorial groups of Victoria. Members of the Council are empowered to make decisions on matters relating to heritage jurisdictions for which they don’t have the authority to speak for. For instance, the 38 territorial/traditional owners are currently represented by 7 members ‘appointed by the Minister for Aboriginal Affairs’. The 7 members, according to the VIC.GOV.AU website, claim ancestry from 6 of the 38 groups. This equates to the overwhelming majority of traditional owners not being fully represented and not having a voice on the Council. The extent of this exclusion from Heritage Rights representation is in breach of Cultural Rights conventions and Self Determination principles (Anderson; Hyttten; & Land, 2006).

These are not Indigenous chosen structures that reflect broader traditional based rights and cultural protocols. They are the very top down structural arrangements chosen and imposed by the Government on the people. The way that the Heritage Council was established undermined the work of the KHWG who advocated for the creation of a Council that reflected the nature and distribution of Traditional Owner groups in Victoria. Most importantly it needed to be democratically elected to fully represent the cultural rights and interests of the Traditional owner groups as laid out under the United Nations Charter on the Rights of Indigenous Peoples to which Australia is a signatory.

Being Government appointees exempt from the democratic process that should apply to State and National bodies elected to represent Indigenous communities, begs the question of where their accountability and loyalties may lie on crucial Heritage issues. Just where their interest may lie when conflicts are likely to occur between Government, economic and community based interests is a matter of deep concern? The other relevant question under section 142 of the ACH, 2006 is the conflict of interest provision. If a member of the Council has a pecuniary or personal interest in the subject-matter of a decision made by the Council, the member must declare the nature of this to the Council. The question of whether a conflict of interest may arise if a member or members of the AHC are also members of the Treaty Assembly and other relevant land and cultural authorities is a case in point. Whether this may constitute a conflict of cultural rights and other rights being negotiated including land justice remains uncontested (see- Victoria Government’s Treaty: Process & Representation, pp. 7-8).
In critiquing the function of Heritage Advisory Structures there are many that have been created to advise Ministers on Cultural Heritage and other matters. Membership is usually selectively chosen and appointed by the Minister and there is nothing in any of the Acts requiring community selection or election under the tradition of representative democracy. Indigenous heritage campaigner, Henrietta Fourmile, regards them as ‘classic token Aboriginal committees’ (Fourmile, 1989:51-52). Advisory Committees can certainly give advice, but it is the Minister that determines 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 formulation of advisory committee membership as recommended in the Government reforms of the 80s. They are selectively chosen by the Government from its inner circle\cohort responsible for cultural heritage management. Those 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 process. ‘Self Determination’ and ‘Community Control’ principles are given short shrift in favor of the Minister’s discretionary powers on these matters. Accountability and Transparency mechanisms on decisions made by the Council are a major concern for the Council’s credibility and cultural integrity in the community.

That is the general gist of the nature composure and the process of Heritage Councils delegated with powers to make broad ranging decisions on Cultural Heritage matters including determining successful applications for Registered Aboriginal Parties, RAPs under the changes to the 1987 Heritage Legislation.

Ownership and Control: Fact or Fallacy

Other changes that weakened the powers of the 1987 Heritage Act is the watering down of the provisions that gave greater ownership and control to Koori people. The Yorta Yorta people were quick to challenge the changes that were taking away those gains made in the 80s. The Yorta Yorta Nations Aboriginal Cooperative YYNAC saw the Aboriginal Heritage Bill 2005 (Vic) as ‘a step back’ in time and a ‘step back to assimilation’. They were against the way the Bill was introduced which they said was ‘not fully what traditional owners were asking for or consulted about’. The Heritage Bill in their submission ‘was similar to the giving in one hand and the taking away in the other’ proposition raised at the outset. Taking away the rights of Indigenous peoples and the power to protect their cultural heritage was to the YYNAC like another ‘government body telling us what to do and how to do it... AGAIN’ (Yorta Yorta Nation Aboriginal Corporation). The YYNAC also criticised the Act’s provisions that gave the Minister for Aboriginal Affairs overarching powers to make ‘Interim and Ongoing Declarations’ to protect an Aboriginal object or place and ‘damage to heritage’ as permitted
in accordance with ‘approved permits and management plans’ (The Parliament of Victoria, 2006, p.36). While attempts have been made to enshrine Indigenous voices within the Act, substantial and conclusive power still lies with the Minister, whose political and economic priorities override those of Indigenous Australians-revealing a step back in time approach.

Significant criticisms have also arisen about the process by which RAPs are appointed by the Council. Many Indigenous people in Victoria have argued that the burden of proof that the Council requires from applicants wishing to gain status as traditional owners is invasive and too high (Environment and Natural Resources Committee, 2012, p.65).

The Council requires genealogical data, anthropological and historical materials, information obtained via the public notification process and the knowledge of researchers external to the Council in the decision-making process (Environment and Natural Resources Committee, 2012, p.69). The 2006 Act thus enforces a process whereby Indigenous Australians, in order to obtain agency regarding their own cultural heritage, must have their identity legitimised by a system that has historically denied them of this very agency (Environment and Natural Resources Committee, 2012, p.69). The words of Mr. Allan Wandin, a witness in the enquiry, exemplify this notion, “it would seem that the members of the Victorian Aboriginal Heritage Council know my CULTURE better than the Traditional WOI-WURRUNG people” (Environment and Natural Resources Committee, 2012, p.69). Furthermore, the privileging of “expert” researchers in these decisions constructs a space in which non-Indigenous heritage practitioners stand to benefit economically from the commercialisation of Indigenous knowledges (Tran & Barcham, 2018, p.13).

Those gains made in the 1987 reforms that acknowledged Aboriginal occupation and returned the ownership to its rightful owners were dealt a severe blow by the 2006 Act and subsequent 2016 amendments. Part 1. b of the Main purposes section of the 2006 Act have taken away occupation and ownership and replaced it with ‘empowerment of traditional owners as protectors of their cultural heritage on behalf of Aboriginal people and all other peoples’. Section c. refers to the ‘strengthening of the right to maintain the distinctive relationship and connection with the land waters under traditional based laws and customs’. Section 3 of the Objectives indicates another watering down effect to the 1987 reforms by diluting the power of ownership and replacing it with the recognition of Aboriginal people as the ‘primary guardians, keepers and knowledge holders of Aboriginal cultural heritage’ (ACH, 2006: sec 3 Objectives,(b). Recognition has become a loosely defined term. What it actually delivers, as witnessed in the Native Title and Constitutional recognition scenarios, is still being grappled with. The void created by the recognition space conundrum is rather vague further lacking in clarity and substance.
Taking Away Heritage Rights

Taking away those rights that were cornerstone principles of the 1987 Act was an act of betrayal of the Koori people who fought long and hard to have fundamental rights acknowledged up front. It also undermined the integrity of those Ministers of the Cain and Kirner Government who endorsed the Charter of Rights that were mandated from the extensive statewide Consultation process that took place. While there has been a major paradigm shift in the nature and extent of Heritage laws from the days of the discriminatory Relics Act 1972, the taking away or watering down of rights to appease paternalistic and assimilationist agendas is alive and well in current Government circles. Those responsible for redrafting those sections of the 2006 Heritage laws should hang their heads in shame for breaching Indigenous customary law protocols and International Conventions on the rights of Indigenous Peoples to Self Determination and the right to have control over their social cultural and economic affairs.

Ownership of Ancestral Remains

There are some positive changes in the 2016 Amendments worth mentioning that delivered stronger regulatory and ownership powers for Ancestral Remains. Division 2. of the amendments ‘made certain Aboriginal people owners of Aboriginal remains’. It also strengthened provisions for penalties and the return of ancestral remains in custody of public entities and universities who have to notify and report details of remains in their possession to the Council (Sec.14 AHA, Amendment Act, 2016 .pp.23-25). The Council is empowered to ‘transfer remains to relevant Traditional Owners or RAPs who may be entitled and willing to take possession custody and control of remains. In the absence of relevant Aboriginal parties they are authorised to transfer remains to the Museums Board for safekeeping or otherwise deal with the remains as the Council thinks appropriate’ (Sec.18-19, AHA, Amendment Act, 2016 .pp.23-25).

These are commendable changes that give greater comfort to the many Indigenous communities that have had to deal with the extent to which their ancestral remains have been willfully stolen for scientific research. It gives some relief for those communities who have had to deal not only with dispossession of land but with criminal offence of grave robbing and desecration of sacred burial grounds.

The skeletal remains issue 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 of some 2000 skeletal remains including craniums (skulls) that were dug up and stolen from Yorta Yorta country in the early 19th Century (pers comm as a Traditional Owner). The KHWG and the Museum Koori Liaison Officer were instrumental in eventually restricting the use of skeletal remains for scientific studies and public displays including those held by the University of Melbourne. This became the catalyst for Jim Berg's legal actions against the Museum and the University of Melbourne that followed in April 1984. Since then many Koori communities have been successful in regaining control of skeletal remains and reburying them within the ancestral lands (Atkinson, 1984; Sydney Morning Herald, 3 October 1984; Bird, 1993:81-84; Berg v Council of the Museum of Victoria and Ors (1984) VR 613; Berg v The University of Melbourne Unreported decisions No 2175 of 1984). It was these actions together with the continued assertions of Koori rights that challenged the existing status quo and the domination of Cultural Heritage matters by non Indigenous interests and helped to push Koori heritage reforms forward.

The question of ‘ownership of ancestral remains’ in the AHA, 2007 however, is inconsistent with the declaration of Ownership of Heritage in the 1987 Act, since removed and replaced with the notion of ‘guardians and keepers’. Ironically the imputation is clearly in favor of ownership being bestowed in the dead rather than the living? Implicit in this call is the fact that if ownership of ancestral remains belong to the living doesn’t that confirm physical occupation and ownership of land and cultural heritage as defined under section 4. of the AHA, 2007 (s.4 (ii) AHA, 2007 Definition of Aboriginal Cultural Heritage meaning, places, objects and skeletal remains, p3.) Placing ownership on one element of the Cultural Heritage and dissecting it from its original context of ownership is another exposure of the dictates of Aboriginal Heritage law being made by Governments molded in the colonial mindset. It is as an alien concept to Indigenous epistemology and a paternalistic way of saying we’ll give you ownership rights to your dead but not to your ancestral heritage which is yours by birthright. It is another example of how western constructs are used to dismember the holistic view of cultural ownership and dissect it into separate categories to be owned and controlled by the State. Reparation to the living of their rights as the inherent owners of their culture including ancestral remains was formally acknowledged in the 1987 Heritage Act. This was a huge step forward for heritage justice in accordance with, the United Nations Declaration on the right of Self Determination, embodied in Article I. of the Charter of the UN, and Article. 3. of the UN Declaration on the Rights of Indigenous Peoples (DRIP) 2007.

Human Rights Instruments

These are the standard setting instruments of Human Rights that apply equally to all human societies further encoded into the Indigenous Peoples Declaration in 2007. Article 12. 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. The DRIP was officially adopted by the Australian Government at a ceremony in Parliament House, in 2009, reversing the decision of the previous Liberal/National Party Government who voted against it in 2007—see Australia Adopts DRIP, 2009. They are the legal instruments that the Koori Heritage working group engaged for negotiating the Heritage reforms of the 80s. The DRIP Convention, 2007 gave further power for Indigenous rights and heritage control when the AHA, 2006 was enacted and supported by the The Charter of Human Rights and Responsibilities Act 2006. The Victorian Charter is a legal framework that sets out the basic rights, freedoms and responsibilities of all people in Victoria. This includes those ‘Aboriginal Cultural Rights that are held specifically by Aboriginal people in Victoria’ (see Human Rights Indigenous Rights, Victoria 2006). Indigenous Ownership of culture is verified by the Council for Aboriginal Reconciliation, 1994. The Councils asserts that Europeans can no longer be the moral custodians of information about, or policies towards, Indigenous Australians and that 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).

There is an absence of these important human rights covenants being fully applied and adopted into the AHA, 2006 and amendments.


There are other deficiencies in the overall structure of Heritage administration and management, 2020 to that proposed by previous Labor Government under its policy commitments to Koori control of their affairs (Relics Act Review Committee Report, 1986). Consistent with the Governments’ commitments to the reforms of Koori Heritage and the need for a more coordinated approach, the Attorney General, the late Jim Kennan, who was the Minister for Aboriginal Affairs, proposed the visionary concept of a ‘Victorian Aboriginal Cultural Affairs Institute’. The Institute would be an umbrella organisation that would bring the diversity of cultural programs together under the one roof philosophy. The idea of the Cultural Institute was driven by support for the holistic notion of Koori heritage. It would allow for multi-disciplinary learning, innovation, and the development of career opportunities for Kooris in the administration and management of their heritage. Having all aspects of Koori Heritage housed under the one roof, rather than the fragmented approach that exists, was the preferred option (Victorian Labor Party Policy on Aboriginal Affairs, 1982, 1985; KHWG Charter, 1984).
On the basis of the key principles of heritage reform, 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 and democratically elected 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 strengthened physical protection of sites and objects; expanded 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 maintaining the historic, economic and spiritual significance of culture that still exists for Kooris in Victoria (Victorian Government Media Unit, 1986).

The reforms gained by Kooris utilising existing politico-legal processes set the scene for Kooris to regain ownership and control of their heritage as a fundamental right. The concept of a ‘Victorian Aboriginal Cultural Affairs Institute’ was inspirational, visionary thinking driven by admirable leadership. The idea of housing everything under the one roof philosophy crystallised the grand plan for present and future generations seeking to pursue their career paths in the broad ambit of an Institute of Cultural Learning. It was envisaged as a place with multi disciplinary opportunities for learning, the pride of Indigenous history, identity and the maintenance of connections with country. Indeed looking back and reaching forward, it remains an important vision and plan for the future. No doubt the template is still there but whether it remains a pipe dream of the future only time will tell. Whether the initiative and lateral thinking is at the front of the Heritage program and its leadership as it stands is another matter.

As can be seen from the analysis of Heritage legislation there is still a pervasive overarching paternalistic view that primarily conceptualizes culture in terms of physical entities, revealed in frequent reference in legislation to sites places, objects, ancestral remains and sites. This definition, conflicts sharply with broader and holistic cultural values and beliefs of Indigenous peoples promulgated by the Koori Heritage Working Group and supported by the UN Commission of Human Rights, 1994. The KHWG grappled with this construct of Heritage in the 80s and was successful in expanding the narrow definition of Heritage to include Aboriginal oral traditions which are connected with the cultural life of Indigenous people including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs (see PART 11A Interpretation of 1987, Cultural Heritage). The narrow restrictive definition of Heritage was broadened by evoking the value of Indigenous epistemology to view Heritage in its original holistic cultural timeframe and the inseparable relationship between the tangible and non tangible elements exemplified in the framework of this paper.
By negating the importance of the intangible heritage values including oral traditions in the current legislation, it has the effect of excluding and dismembering the holistic notion of Indigenous heritage. It is true that amendments to the Victorian Aboriginal Heritage Act in 2016 provided recognition of intangible forms of heritage as being under the ownership of Aboriginal Parties, which can be viewed as a constructive step forward (Tran & Barcham, 2018, p.12). Missing from the legislation, however, are provisions for the cultural dimension in which this is realised in practice, which means that Indigenous ownership is still denied or watered down. This is epitomised through an examination of Australia’s National Heritage List, which stipulates that intangible heritage must be attached to a physical place to receive recognition, and often requires validation from “experts” (Tran & Barcham, 2018, p.13). In Victoria, specific heritage acts exist separately from the Native Title Act, the Owner Settlement Act 2010 (Vic) and land protection acts such as the Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009 (Vic) (Petrie, 2018, p. 16). The disaggregation of Indigenous knowledge’s across existing legislation makes government departments and states complicit in exacerbating the erosion of Indigenous heritage by ignoring the holistic and interconnected nature of Aboriginal culture. It undermines the broader philosophy articulated by the Commission on Human Rights and other conventions which emphasises that the ‘diverse elements’ of Indigenous Heritage ‘can only be fully learned or understood by means of the pedagogy traditionally employed’ by Indigenous peoples themselves (Commission of Human Rights, UNESCO, 1994, Para.8.). Existing impediments within the system are the barriers that frustrate the broader and more forward and lateral thinking offered by Indigenous people.

This fragmentation of natural and cultural heritage reflects a poor understanding of the way in which Indigenous concepts of land, water and resource management do not exist independently of Indigenous cultural heritage but are inextricably linked. Legislative attempts to understand Indigenous knowledge by filtering it through non-Indigenous categories distort the protection intended, thus sustaining colonial processes of subjugation and control. The following case study elaborates on the inherent flaws within colonial constructs.

Case Study: The Djab Wurrung Trees Saga

The Victorian State Government’s proposed destruction of the sacred Djab Wurrung trees is a relevant case study that exposes key deficiencies and power struggles within the AHA.2006. The Government response to this controversy demonstrates the way in which Anglo-centric legal instruments claiming to protect Indigenous knowledge have the opposite effect of taking away Indigenous people’s cultural rights. The current project includes the duplication of a section of road between Ararat and Buangor, with plans to destroy over 260 trees sacred
to the Djab Wurrung peoples (Hayman-Reber, 2018). The 800-year-old trees have traditionally been used for important cultural practices, including cooking and birthing, and some have been culturally modified to indicate other cultural practices.

For Traditional Owners, the trees hold enormous significance, exemplified in the official statement of the Djab Wurrung Embassy, a Traditional Owner-led campaign, “It is our food, spirit, identity and culture. Our lands have a spiritual value and not an economic one. If the land is destroyed so is our dreaming” (Djab Wurrung Protection Embassy, 2019). When faced with opposition, the Victorian Government claimed that a cultural heritage management plan for the project had been agreed upon in discussions with Traditional Owners, including the Mar tang Incorporated and the Eastern Maar Aboriginal Corporation (Johnson, 2019). The Department of Premier and Cabinet released a statement in June 2018, claiming that both groups: "have stated they do not believe the trees to be birthing trees or to otherwise have cultural significance" (Johnson, 2019). Negating these claims, however, Eastern Maar Aboriginal Corporation’s CEO Jamie Lowe said his organisation was not involved in the cultural heritage management plan (Johnson, 2019). These contradictory statements are revealing of the tokenistic way in which consultation with Indigenous groups was carried out.

While the minimum requirements of the Aboriginal Heritage Act 2006 were met, ultimately consultations were framed in such a way as to reinforce government interests. This points to the broader issue that technical compliance with cultural heritage protection laws can serve to bolster government authority, emphasised in Lowe’s elaborating statement, "If we send an application to the state government or the federal government, even though they have their thresholds of what is cultural heritage, our measures are different as a community” (Johnson, 2019). This aligns with the notion that these supposedly progressive initiatives can conceal and normalise the embeddedness of continued colonisation. Furthermore, Yigar Gunditj, Bindal and Erub Mur Islander woman Tarneen Onus-Williams pointed out in an interview with NITV News that Mar tang Incorporated, which is the official RAP for Djab Wurrung country, only consists of one family with four members, who in her words are “not representative of all of the Djab Wurrung people” (Hayman-Reber, 2018).

This concentration of power is indicative of the problematic nature of the RAP process and its limited capacity to ensure a broad scope of Indigenous interests in negotiations of cultural heritage. In January 2019, the then Environment Minister rejected an application by Traditional Owners to protect the area under the AHA, 2006 (Johnson, 2019). Despite the stated objectives of the Act to “recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage”, real power still ultimately lies with
government Ministers, whose economic and political considerations invariably eclipse Indigenous concerns (The Parliament of Victoria, 2006).

Djab Wurrung Embassy Campaign

The Djab Wurrung Heritage Protection Embassy succeeded in achieving revision of the project, only as a result of a grassroots campaign whereby the group established camps at the proposed construction sites to physically protect the trees (Djab Wurrung Protection Embassy, 2019). As a result, Tim Price, the Program Director for the Western Highway construction, reported in March 2019 that changes to Western Highway plans would protect two trees that had been flagged as significant by the Indigenous community (Hocking, 2019). While this progression is a significant victory that can be ascribed to the work of Djab Wurrung activism, there are still other trees which have not been given the same protection. This selective protection epitomises the colonial notion that cultural heritage exists in discrete, separate entities; that culture can be assigned to two trees while the surrounding area faces harm. Again, the holistic notion of Indigenous cultural heritage as integrated with land, water and the intangible is delegitimised by reductive colonial constructs. At the time of writing, the Djab Wurrung Heritage Protection Embassy has reported that “major Roads Projects Victoria has agreed not to start works until 12th of June. This agreement was made in regards to the Federal Court Proceedings that are still currently taking place” (Djab Wurrung Protection Embassy, 2019). This undoubtedly represents a triumph for the Djab
Wurrung people and is a testament to their resilience. It is imperative, however, to highlight that it was only through activism outside of formal bureaucratic instruments that Indigenous voices were heard, revealing the significant structural flaws in a legal system that claims to promote Aboriginal autonomy.

Forcing Indigenous Australians to operate within frameworks that reflect little understanding of Aboriginal identities embeds processes of colonisation within heritage legislation. While improvements have been made to some heritage laws in Australia, the Anglo-centric lens through which Indigenous culture is still widely conceptualised distorts and reverses protective measures. These bureaucratic processes may purport to increase Indigenous agency, however it is vital to remember that these structures of power were for the most part created by and ultimately serve non-Indigenous peoples agendas in promoting government and non-Indigenous interests. The fight of the Djab Wurrung people, however, reflects the indelible determination that Indigenous Australians have shown and continue to show in the face of adversity. Despite having their culture devalued, stolen and destroyed, and being promised forms of protection that only serve to conceal deep versions of colonisation, the destruction of cultural identity finds resistance in the voices of Aboriginal Australians. Perhaps it is through these bottom-up forms of activism and political engagement that Indigenous Australia will achieve agency over and recognition of their own cultural heritage.

The Victorian Minister for Aboriginal Affairs, Gavin Jennings played a key role in the changes to existing Aboriginal Cultural Heritage legislation, 2006 and subsequent amendments 2011, 2016. It is no surprise that his power base and total control of Cultural Heritage matters and appointment of Council members reigned supreme in his cohort of Aboriginal Affairs administration and policy direction. Minister Jennings ability to achieve greater positive social, cultural and economic outcomes for Indigenous Victorians, is further exemplified in a radio interview in which he said that he was prepared to ‘roll up his sleeves and get a bit of dirt on his hands’ (Interview 3CR Radio, 2 August, 2005). Rolling back the sleeves to achieve positive cultural outcomes is an encouraging metaphor. But taking away and or diminishing hard fought cultural heritage reforms Kooris achieved in the 1980s, remains a stain on the Government’s practice of returning rights in one hand and taking back in the other scenario. The undermining of the extensive Cultural Officer Program in 2006-7 by ‘sacking all 32 Cultural Heritage Officers some of whom were elders thus stripping Koori people of their Heritage rights’ is one of the lasting legacies of the Jennings administration (pers.com: Jason Tamiru, Yorta Yorta, 13 June, 2020).

Summary:
Looking back at the Heritage Struggle as an active member of the Koori Heritage Working Group, (1984-88) it has been a remarkable journey. I am proud to honor the solidarity of all those who dedicated their lives and efforts to what we achieved many of whom have been called back to the Dreamtime-a path that we will all travel one day. Being able to draw on the knowledge and experience of the struggle for Heritage justice has produced many positive outcomes. I have been privileged to teach many courses in Land and Heritage justice over the decades both within the academy and through community based education with the Oncountry Learning program, University of Melbourne. There are untold numbers of students and people from all walks that have listened, learned, and taken away the story to share with others. The storylines have been articulated through cultural exchanges with Indigenous peoples and human rights forums throughout the world with outstanding success. Those students who have been privileged to come Oncountry, to view the tangible evidence of Indigenous occupation and to hear the story from Indigenous voices have a much greater appreciation of the connection between land and culture ownership rights. The power of the voice, spear of the pen and collective organisation are the key strategies nurtured within us by our inspirational leaders. They are the political strategies that the Koori Heritage Working Group engaged to take on the powers that be and to bring about the significant changes that were collectively achieved.

With the benefit of history, it is reasonable to say that perhaps Indigenous people place too much faith in the promises of Governments, and the question of Self Determination and the fight for traditional based rights still hangs in the balance in the 21st Century. In the final analysis it must be said however that the political and 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. As we enter the Treaty phase of our struggle there is an urgent need for heritage reforms that deliver ownership and control to Traditional Owners. In the journey ahead it will be interesting to see whether the overarching vision of the ‘Victorian Aboriginal Cultural Affairs Institute’ finds its rightful place front and centre of the Treaty process.

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Koori Heritage & Self Determination
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The Environment Protection (Impact of Proposals) Act 1974 (Clth)

The Constitution, Commonwealth of Australia CGPO 1972 (Clth)

The Council for Aboriginal Reconciliation Act 1991 (Clth)

The Native Title Act 1993 (Clth)

The Victorian Museums Act 1983.

Relevant Cases:


Berg v The University of Melbourne Unreported decisions No 2175 of 1984.

International Instruments:

The Universal Declaration of Human Rights 1948.


The International Covenant in Civil and Political Rights 1966.


