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Exploring the need and potential for national Indigenous heritage legislation in Australia

Anne McConnell[a], Jamin Moon[b] and Jo Thomson[c]

[a]Heritage consultant, Hobart, Australia; [b]First Peoples-State Relations, Department of Premier and Cabinet, Melbourne, Australia; [c]Department of Archaeology, University of Western Australia, Perth, Australia

ABSTRACT

Australian Indigenous heritage legislation has been revealed as mostly having low competency and not being fit for purpose for protecting Indigenous heritage, and it desperately needs to be reformed at both national and state levels. In this paper, we envisage a pathway forward for national heritage legislation reform, with the intention of triggering reflection, debate and, above all, action. We outline what a necessary and effective national approach to protecting Indigenous heritage in Australia through legislation might look like. We argue that the most effective way forward is to revise State-level Indigenous heritage legislation, plus have additional strategic planning and other local government level focused legislative changes, and a single new piece of Commonwealth Indigenous heritage legislation that sets minimum standards for state legislation. The Commonwealth legislation should be underpinned by Indigenous rights-based and heritage values-based approaches, and adopt an inclusive definition of heritage in line with Indigenous world views and current heritage practice—to be reflected in the mandatory minimum standards set for State-level legislation; provide a safety-net mechanism; and provide for an independent Commonwealth statutory Indigenous heritage decision-making body with statutory functions.

KEYWORDS

Indigenous heritage legislation; heritage law; cultural heritage management; Australian heritage; rights-based legislation; values-based legislation; legislative reform; heritage planning

Introduction

There is a great, and urgent, need for new Indigenous heritage protection legislation, and legislation reform at all levels of government across Australia (JSCNA 2021; McConnell et al. 2021). This need stems from a raft of issues that plague current Australian Indigenous heritage legislation, including the highly divergent, inconsistent and mostly inadequate State and Territory (State) laws; the failure of legislation to respect Indigenous rights and to fully recognise the nature of Indigenous heritage; and the many gaps, overlaps and inconsistencies between State and Commonwealth legislation.

These issues are further complicated by the diverse values and views on rights and approaches held by different interest groups across Australia, and the ongoing tensions between Indigenous heritage protection and national priorities for land use and access to resources. Together these issues make Australia's present-day Indigenous heritage regime ineffective.

It is important here to acknowledge that there have been various attempts to reform Indigenous heritage legislation at both the state and national levels, but with little real improvement in heritage protection or recognition of Indigenous rights achieved (except arguably in Victoria) (McConnell and Dortch 2023). This failure cannot be understood without recognising the political and economic context of reform in this area, the particular relationship between the Commonwealth and State Governments, and the changing Indigenous rights context.

This paper envisages a pathway forward for heritage reform in Australia. We draw on recent significant work in this area, including *Dharuwa Ngilan* (HCOANZ 2020) with its vision for Indigenous heritage management and guiding principles; and *A Way Forward*'s (JSCNA 2021) recommendations, in particular 'Minimum Standards'.

In this paper we briefly review the current legislative framework. We then examine the foundational requirements for effective Indigenous heritage legislation in Australia, review potential structural models for new Indigenous heritage legislation, identify key issues relating to the creation of new Indigenous heritage legislation for Australia, and suggest how these can be addressed. Finally, we outline what a necessary and effective national approach to protecting Indigenous heritage in Australia through legislation might look like.

This paper provides a professional and academic cultural heritage management perspective on

CONTACT Jo Thomson jo.thomson@research.uwa.edu.au, jo@bigislandresearch.com.au Department of Archaeology, University of Western Australia, Perth, WA, Australia

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Australian Indigenous heritage legislation. The views expressed are based on the authors' long term cultural heritage experience and interests in Indigenous heritage legislation.

Framework considerations

The existing Indigenous heritage legislation framework

In Australia, the long-term protection of Indigenous heritage is primarily achieved through protective legislation, although some statutory protection is also achieved through protected area legislation and statutory planning. The protective legislation framework is complex and operates at all three levels of government (McConnell and Janke 2021).

There are currently 18 separate Acts in Australia that provide some form of Indigenous cultural heritage recognition and protection, including ten State Indigenous heritage protection Acts, four Commonwealth Acts with Indigenous heritage protection provisions, and four State planning or environmental assessment type Acts (McConnell and Janke 2021). All these laws operate differently and offer different protections; however, all dedicated State Indigenous heritage legislation generally provides presumptive or automatic ('blanket') protection, although that protection is generally limited to sites (or areas) and objects. These Acts in most cases operate independently.

At the Commonwealth level, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHPA 1984) is the only Act relating exclusively to Indigenous heritage, but it does not provide blanket protection. The other three relevant Commonwealth Acts are broader heritage protection Acts, but provide protections only for specific aspects of heritage. For example, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA 1999) provides protections for World Heritage, National Heritage, and Commonwealth owned heritage; while the *Protection of Movable Cultural Heritage Act 1986* and the *Underwater Cultural Heritage Act 2018* provide protection against the export of movable heritage, and maritime heritage, respectively.

Additionally, there is a suite of related Indigenous legislation such as the Commonwealth *Native Title Act 1993*, which has national scope, and various State Indigenous land rights Acts and human rights Acts, which all have the potential to offer some protections for Indigenous heritage through the recognition of Indigenous cultural rights and custodial responsibilities for land (McConnell and Janke 2021). Further, the Commonwealth also has obligations resulting from the endorsement or adoption of international declarations such as the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the *Convention concerning the Protection of World Cultural and Natural Heritage 1972*. This has flow-on effects for the States.

This legislative complexity has been identified as a significant factor in the inadequate protection of Indigenous heritage in Australia. For example, the *Australian 2021 State of the Environment* report found:

> Overall, the framework is too complex and is poorly connected, leading to gaps in protections, and confusion about responsibilities and obligations, especially between levels of government (McConnell et al. 2021: 138).

Further, Thomson (2023) found, in the implementation of Indigenous heritage legislation, particularly in Western Australia, that there is a significant divergence in understandings of the purpose, goals and beneficiaries of the legislation. This has led to the use of the legislation to achieve opposing outcomes and the failure to protect Indigenous heritage effectively.

We argue that effective Indigenous cultural heritage legislation in Australia is best achieved through comprehensive national level legislation establishing a common purpose, a framework and goals for all Indigenous heritage protection—an approach that will clarify the interrelationship and hierarchy of current legislation, and resolve existing gaps. A new Commonwealth Act, or a substantially amended ATSIHPA 1984, is therefore required.

Foundational requirements for indigenous heritage legislation

For legislation to achieve what most people want, and deliver effective culturally appropriate protections, particularly where there are often disparate parties with different priorities, it must have a clear purpose and rationale. Key principles, or foundational requirements, play an important part in this. In relation to Indigenous heritage legislation in Australia, two critical principles are explicitly required: an Indigenous rights-based approach, and a values-based approach. These approaches will best meet key stakeholder aspirations and needs, contribute clarity and transparency, and assist in developing, and successfully adopting, new legislation.

A rights based approach

A rights-based approach is one which gives Indigenous Australians the right to make decisions about their cultural heritage according to their own

organisational systems and priorities, with decisions based on the principle of free, prior and informed consent (see UNDRIP 2007: especially Articles 19, 31 and 32).

Of particular relevance is Article 31 which states that 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions' and that 'In conjunction with indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights'.

Although UNDRIP is not legally binding on supporting nations, it establishes a clear commitment to: adhere to its critical and broadly accepted principles for Indigenous heritage protection; accord First Nations Australians agency in the protection of their heritage; and codify these principles in a broadly acceptable and enforceable manner, the most obvious of which is through legislation. Importantly, adopting a rights-based approach in line with UNDRIP (in conjunction with Indigenous views) will provide guidance and clarification around critical elements of Indigenous heritage legislation, including definitions of Indigenous heritage, Indigenous decision-making powers and representation, heritage impact assessment and approval processes, and review processes.

An Indigenous rights-based approach is something Indigenous Australians have been calling for since at least 1982 (Langford 1983)—it was identified as being essential in creating effective Indigenous heritage legislation as far back as the 1990s (Evatt 1996; Moon 2019); and is still seen as critical to developing effective Indigenous heritage legislation (HCOANZ 2020; McConnell et al. 2021). Yet none of the existing Australian legislation, with the possible exception of the Victorian Indigenous heritage legislation, incorporates a rights-based approach.

It is therefore of critical importance for Indigenous heritage legislation in Australia to be revised to include a rights-based focus.

A values-based approach

A values-based approach places heritage values at the centre of heritage conservation and management. It bases heritage planning, decisions and actions on a comprehensive understanding of the range of possible heritage values and aims to protect these values (Australia ICOMOS 2023). This is an established and widely used approach, and it is the general approach taken in Australia for cultural heritage conservation (and also natural heritage), including in much of the existing heritage legislation. Although this approach was developed in Australia, it is now appreciated and adopted widely overseas because of its usefulness (Avrami et al. 2019).

This approach clarifies why heritage items and areas are being protected *and* how to manage them. The approach also promotes respect for heritage as a complex set of values, not just as physical objects or places. As such it facilitates acknowledgement and protection of the broad range of types of cultural heritage recognised today, something that is particularly needed in Indigenous heritage legislation (Thomson 2023). A values-based approach also facilitates inclusive and collaborative heritage management, which is likely to result in better-informed decision-making, and ultimately improved heritage outcomes (McClelland et al. 2013), and has been shown to have led to better recognition of the rights of Indigenous peoples to define and manage their own heritage (Buckley and Sullivan 2014).

A values-based approach therefore provides a crucial basis for new Indigenous heritage legislation: it will help in defining heritage; establish clear conservation objectives for heritage; provide clear, consistent processes for determining what happens to heritage (Australia ICOMOS 2023); and lead to a higher level of inclusivity, clarity and transparency in heritage decision-making.

Potential models for indigenous heritage legislation

In exploring potential new Indigenous heritage legislation, it is useful to examine existing Australian models and recent legislative reform proposals.

State level models

At the State level, statutory heritage protection is provided in four different ways: automatic ('blanket') protection; protecting heritage assessed and explicitly listed as 'significant'; protecting specific areas acknowledged as 'significant'; and protection through zoning of areas of heritage significance (McConnell and Janke 2021).

Legislation exclusively relying on protected areas or zoning to protect heritage generally has other key purposes (e.g. planning), hence is not considered optimal for Indigenous heritage protection. Area-wide protection and zoning are nevertheless useful mechanisms for Indigenous heritage protection *in conjunction with* blanket or listing models, especially for holistic natural–cultural values protection, for particularly culturally-significant areas, and where the precise nature of values is not known or cannot be articulated for reasons of cultural sensitivity.

Most dedicated legislation provides automatic protection and a process to assess the impact of proposed disturbance of land or known heritage to

manage those impacts. Key problems with legislation of this type are their reactive nature and the often limited agency given to Indigenous peoples.

Acts that only protect listed significant heritage generally combine Indigenous and non-Indigenous heritage and, often, natural heritage, and provide the commonly used model for non-Indigenous heritage protection legislation in Australia. This model also employs a reactive process in relation to assessing potential harm to heritage, but also has other disadvantages for Indigenous heritage protection, including the use of regulated significance 'levels' inappropriate for Indigenous heritage (Macfarlane and McConnell 2017); and provides less Indigenous agency than other legislative types. There is also little appetite for this type of legislation in Indigenous communities (McConnell et al. 2017).

While many State Acts have useful elements, only automatic protection models appear to have the potential to provide effective Indigenous heritage protection, but require significant modification to be fully effective (McConnell and Dortch 2023). However, in our view this type of legislation would not work at the national level given the more complex and diverse operational environment and heritage protection obligations, and differing State and Commonwealth land and resource management responsibilities.

National level models

ATSIHPA 1984 was designed as an Act of last resort, invoking Commonwealth intervention only when a State Act fails to protect significant heritage (McConnell et al. 2021). Intended to be an interim Act, it was designed to last only a few years before national land rights legislation was developed (Evatt 1996). This did not occur and, as a result, this Act today is deficient in many areas: it is particularly reactive in nature; has limited applicability; lacks provision for ongoing management; lacks cohesion with State laws; and fails to accord appropriate status to relevant Traditional Owners in the declaration process. It also fails to address protection of broader heritage such as intangible heritage and Indigenous intellectual property rights, movable heritage and ancestral remains, all arguably requiring national regulation.

Thus ATSIHPA 1984 requires substantial modification (and significant additions) if it is to provide the basis, or a template, for a new national Act. Alternatively, ATSIHPA 1984, but amended, might still have a role, as it currently does, as a mechanism of last resort where the Commonwealth or State government legislation fails to meet new statutory minimum standards.

The EPBCA 1999 has Australia-wide application and also includes Australian maritime territory. It is regarded as 'omnibus' legislation, in this case providing for biodiversity conservation and protection of the environment generally. In relation to heritage, however, it only provides protections for Australia's World Heritage properties, and National Heritage and Commonwealth Heritage places (McConnell and Janke 2021). Protection is offered through explicit recognition and listing as one of these three types of heritage. Management of this heritage is delivered by States, with the Commonwealth ostensibly having oversight, although in practice Commonwealth Government oversight is minimal and arguably inadequate (McConnell et al. 2021).

As well as providing limited protections, the EPBCA 1999 is also inadequate for heritage protection. Development requiring an environmental effects assessment process under the EPBCA 1999 first requires State level approval and an evaluation confirming no EPBCA 1999 values will be harmed. Only where this cannot be guaranteed does the Commonwealth assess a development (this process is termed 'a referral'). In practice, the Commonwealth generally accepts State assessments, leaving it, in many cases, to external interests to request a Commonwealth assessment where the State assessment is not considered adequate.

We therefore do not see the EPBCA 1999 as a suitable model for national lndigenous heritage legislation: its scope is too narrow despite its complexity; it is at risk of becoming less functional if it becomes yet more complex; and the environmental effects assessment process is flawed. In addition, it does not recognise the full range of Indigenous heritage; the process of identification and listing in relation World and National Heritage is slow and cumbersome; there is no requirement for Indigenous voice or agency; and Commonwealth oversight at a range of levels is poor (McConnell et al. 2021; Samuel 2020).

Commonwealth—State relationships

A further critical consideration in the development of new national Indigenous heritage legislation is the Commonwealth—State relationship in Australia. With States traditionally perceived as having particular areas of responsibility and the Commonwealth others, it is essential for the respective roles of the Commonwealth and States to be considered in creating new legislation. A basic requirement will be a collaborative and agreed bilateral approach, and a high degree of transparency.

Recent reform proposals

It is also important to note two recent reviews and Indigenous heritage reform proposals (JSCNA 2021; Samuel 2020), as these recommend national standards as a key statutory mechanism. In relation to the EPBCA 1999, Samuel (2020) recommends new, legally enforceable 'National Environmental Standards' within the EPBCA 1999 that establish the boundaries for decision making. The JSCNA (2021) recommends specified 'minimum standards' for State level heritage protections as part of a new national legislative framework, but does not specify the nature of this framework.

Discussion

In our view, none of the existing State or Commonwealth Acts is a suitable model for providing effective national Indigenous heritage protection, and new overarching legislation is needed. Further, a single piece of national legislation to which all States and the Commonwealth must adhere is also unlikely to be effective or acceptable given long term tensions in relation to legislation and State versus Commonwealth rights.

However, the proven usefulness of bilateral agreements between the States and Commonwealth to provide a balance of rights and responsibilities (as for example with the EPBCA 1999), and the broad acceptance of the recent proposals for national minimum standards as proposed by the JSCNA (2021) present a potential way forward. This is Commonwealth legislation with mandatory minimum standards for State and Territory Indigenous heritage legislation across Australia, with agreement about relative roles and responsibilities through bilateral Commonwealth—State agreements. To provide effective Indigenous heritage protections, the new legislation would need to include other components, including modified ATSIHPA 1984 provisions to provide emergency protection.

Other important considerations for developing effective Indigenous heritage legislation

Increasing influence of Indigenous heritage perspectives

The first Australian Indigenous cultural heritage protection laws focused heavily on physical sites and objects, reflecting the influence of Western academic values (Moon 2019; Pearson and Sullivan 1995). This emphasis is still evident in definitions of Indigenous cultural heritage in most current legislation. However, the *Mabo* decision and the resultant rise of Traditional Owner power over land management have led to an increasing emergence of Indigenous perspectives about heritage in Western law.

Given Indigenous conceptions of heritage are holistic, viewing the tangible and intangible as symbiotic and inseparable, there is also a significant disconnect arising in relation to the Western prioritisation of the *tangible* over the *intangible* (Moon 2019). Traditional Indigenous worldviews tend to view natural and cultural environments as a single entity that requires holistic protection and management. While this conception is a particular challenge for Western Indigenous heritage legislation, it can be addressed through the acknowledgement of the broad and intertwined nature of Indigenous heritage and by prioritising recognition and protection of *cultural landscapes* (McConnell et al. 2021).

The need to redefine Indigenous heritage is being increasingly recognised, mainly through increasing numbers of documented accounts of the importance of the broader Indigenous values to Indigenous people, especially cultural land/seascapes and intangible heritage, in a heritage protection context (HCOANZ 2020; Martin et al. 2024; O'Sullivan et al. 2023; Ross et al. 2025; Spry et al. 2023). Both ATSIHPA 1984 and the Northern Territory *Aboriginal Sacred Sites Act 1989* have been used to provide broader Indigenous heritage protection in Australia, for example the recent Commonwealth decision to place a declaration of protection over the Belubula River headwaters in NSW (Minister for Environment 2024).

There are, however, practical complexities around the recognition of broader heritage values that need to be addressed to allow effective heritage protection. These are mostly process-related, and include:

- Some heritage is not likely to be revealed to authorities due to cultural prohibitions around disclosure;
- Inadequate consultation requirements may only capture information from Aboriginal groups who may not hold particular knowledge about areas; and
- Inherent and often unconscious bias in the dominant system against valuing the cultural heritage of another culture may preclude proper consideration of such values.

Also, poor approval sequencing under State laws can lead to important cultural information not being revealed to decision makers until late in the approval process. Further, there are no provisions in any State laws that require Indigenous heritage values to be factored into strategic planning decisions, so consideration of heritage is left until the development and approvals stage, which often results in poor

outcomes for Indigenous heritage as well as causing conflict, delays, increased costs, negative public perceptions and lack of public support. This is exacerbated where poor State-level approval sequencing results in Commonwealth interventions.

It is also critical to recognise that Indigenous cultures, and the heritage underpinning them, are *living*. This brings with it a range of requirements, including the need for Indigenous people to have access to Country, as well as heritage, to enable connection and undertaking of traditional practices, along with self-determination in heritage management (McConnell et al. 2021). This highlights the need for Indigenous heritage legislation to be underpinned by a rights-based approach to enable Indigenous peoples to make decisions about their cultural heritage according to their own organisational systems and priorities.

Climate change and evolving energy, housing and resource imperatives

With an increasing need for renewable energy sources, mining is being directed increasingly to critical minerals extraction, and energy generation and transmission will require large new areas both on and offshore, which will be predominantly focussed on remote areas (e.g. the proposed Nullarbor hydrogen generation project). The current housing crisis is also creating immense pressure on governments to facilitate release of large areas of peri-urban land for residential development projects (McConnell et al. 2021). These types of development pose a significant risk to Indigenous heritage.

Indigenous heritage legislation reform must be cognisant of this reality in order to minimise harm to Indigenous heritage and avoid delays and additional costs. This will require a focus on impact evaluation processes, particularly in relation to providing for early and comprehensive impact assessment, sound decision-making and independent review mechanisms. The overview role the Commonwealth has in relation to climate change initiatives reinforces the need for a direct or prescribed national-level approach to Indigenous heritage law reform.

Strategic land use planning, local government and heritage protection

Critical to ensuring effective heritage protection is the ability to identify heritage concerns and potential conflict points between proponents and First Nations Peoples early and comprehensively. Statutory processes linked to strategic planning systems are fundamental to this. Strategic planning operates at a landscape level and governs how statutory authorities such as local governments plan the future use of entire municipalities. Consideration of Indigenous heritage in this early strategic planning stage would identify areas where future development would be inappropriate, thereby eliminating the inefficient and generally costly need to consider unacceptably harmful development proposals, and could dramatically reduce impacts to Indigenous heritage. This approach is particularly important given the very poor protections for Indigenous heritage offered at the local government level (McConnell et al. 2021), and given that currently State-level laws essentially operate at the statutory planning or individual project level.

This type of strategic approach also has significant benefit as it considers Indigenous cultural values at a landscape level, hence providing more holistic values recognition. This would require mapping Indigenous cultural values in the landscape in a usable way for relevant statutory authorities, but such mapping would have the benefit of being able to support the heritage identification requirements of all three levels of government, as well as Indigenous access and land management initiatives. Recent planning system reform in Aotearoa/New Zealand provides an example of how strategic planning to protect heritage has been successfully achieved in an inclusive way (New Zealand Government 2023).

The political weaponisation of Indigenous cultural heritage

Any Indigenous heritage legislative reform will need to acknowledge, navigate and transcend a 'culture war', given that Australia has experienced significant and persistent attacks on advances in Indigenous rights, including cultural heritage protection systems (Benson 2024; Dunckley 2024; Panahi 2024). Nowhere is this more evident than in the unprecedented repeal of the recent Western Australian *Aboriginal Cultural Heritage Act 2021* after only 39 days of operation (Thomson 2023; Thomson and Dortch 2023). In this case, trepidation and objection to the new legislation by the State's agricultural and property development sectors, combined with a concerted media attack that confounded the issue with the Voice referendum, scuttled the new Act.

The evolution of information distribution and consumption globally is also leading to a more politically charged environment, one in which even neutral, scientific concepts such as climate change, are weaponised by increasingly divergent and aggressive political players for their own purposes (e.g. the recent Voice referendum).

Far from being esoteric and inconsequential, this culture war and the politicisation of Indigenous affairs have real consequences. In the present environment, the political reality is that extensive State and Commonwealth reform is unlikely, particularly reform that tips the balance of power significantly towards First Nations Peoples. However, this should not stand in the way of essential reforms to improve protection for Indigenous heritage, including firming up Indigenous decision making authority and Indigenous heritage protection priorities in current State processes. It is likely, however, to require Commonwealth legislation, supported by bilateral agreements with the States, to actively force States in this direction.

Conclusion—finding a way forward

It is clear that Indigenous heritage legislation reform is required in Australia, and at all three levels of government (JSCNA 2021; McConnell et al. 2021; Ross and McConnell 2023). But to what extent should this be achieved or facilitated by national level reform?

As the discussion above shows, our view is that the most effective way forward is to revise State-level Indigenous heritage legislation plus have additional strategic planning and other local government level focused legislative changes, all guided by a single new piece of Commonwealth Indigenous heritage legislation. This legislation, in our view, should:

- Be underpinned by an Indigenous rights-based and a heritage values-based approach.
- Adopt an inclusive definition of heritage in line with Indigenous worldviews and current heritage practice which recognises intangible heritage, cultural landscapes, the holistic nature of Indigenous heritage, and that heritage can be situated on land, in waters and in the sky.
- Set mandatory minimum standards for State-level legislation that addresses both Indigenous heritage protection and strategic planning requirements, to be given effect through bilateral agreements with States.
- Provide a mechanism similar to the current ATSIHPA 1984 for heritage protection where other legislation fails.
- Contain specific regulatory processes for aspects more appropriate for national level governance, potentially intangible heritage, Indigenous intellectual property rights, movable heritage and ancestral remains.
- Clarify the relationship of the various pieces of legislation affecting or providing for Indigenous heritage protection.
- Provide for an independent Commonwealth statutory Indigenous heritage decision-making body with statutory functions in new Commonwealth legislation.

How feasible is this? We suggest the above is highly achievable if there is political will for reform. The approach is practical, and our suggested model is conservative; it parallels the approach taken by the EPBCA 1999, and it fits within the existing Indigenous heritage legislation framework and would require only the amendment or replacement of the ATSIHPA 1984.

The proposed approach is also evidence-based (JSCNA 2021), meets Indigenous human rights requirements and best practice approaches to heritage management, and there is support and guidance already available to aid its development and implementation (Australian Government and First Nations Heritage Protection Alliance 2022; Evatt 1996; HCOANZ 2020; JSCNA 2021; United Nations 2007). The approach also considers key converging and competing priorities, such as climate change and increasing resource consumption and development. While recognising and protecting Aboriginal cultural values in ways appropriate to First Peoples, it is also practical for other land users.

It is well past time Australia reformed its Indigenous heritage legislation nationally to adequately recognise and protect Indigenous cultural values, and to enable Indigenous ways of knowing and cultural needs and responsibilities in heritage protection and management.

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ORCID

Jo Thomson https://orcid.org/0000-0001-6029-394X

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