



**NATIONAL CONGRESS**  
OF AUSTRALIA'S FIRST PEOPLES

Statement to the  
Australian Law Reform Commission

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**Review of the Native Title Act 1993**

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**June 2014**

## About Congress

1. The National Congress of Australia's First Peoples ("Congress") acknowledges and pays respect to our spiritual ancestors, our Elders and the Aboriginal and Torres Strait Islander Peoples as the original and rightful owners of our lands, territories and resources.
2. Congress is the national representative body for Aboriginal and Torres Strait Islander Peoples. Congress has the purpose to ensure the rights of the First Peoples are promoted and protected, and to find solutions to the injustices, disadvantages and impediments that continue to obstruct the development of our Peoples.
3. Notwithstanding Congress' recommendations relating to the current Australian Law Reform Commission ("ALRC") review into the Native Title Act 1993 ("the Act"), Congress supports a wide-ranging overhaul of the Act and the native title system to ensure compliance with the United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration"), international human rights law and concerns raised by United Nations ("UN") treaty bodies.
4. Congress does not consider the native title system is adequately recognising and protecting Aboriginal and Torres Strait Islander Peoples' secure title to their lands, territories and resources or adequately respecting our Peoples' right to economic development through the resources of our lands and territories.<sup>1</sup>
5. Congress supports land rights for Aboriginal and Torres Strait Islander Peoples over their historical and traditional lands, territories and resources. It has been the historical failure since the original British settlers arrived in Australia to respect the property rights of Aboriginal and Torres Strait Islander Peoples, which has led to massive injustices and exploitation of the First Peoples.
6. Native Title legislation does not adequately provide for the return of lands, territories or resources which have been taken without free, prior and informed consent, including adequate provision for remedy or compensation where return of lands, territories or resources is not possible.<sup>2</sup>
7. The determination of native title under statute law and before the Federal Court is biased against the rights of Aboriginal and Torres Strait Islander Peoples. Adjudication of the rights of the First Peoples must be through a fair, independent tribunal where Aboriginal and Torres Strait Islander laws and interests are fairly represented.
8. Congress opposes legislation, government policies and actions that serve to limit or remove the right of the Aboriginal and Torres Strait Islander Peoples to self-determination. We advocate for the right to exercise self-government or autonomy over any matter that directly affects our Peoples, our development and our future. Any proposals for development within our territories or that involves third party exploitation of our resources must occur on mutually agreed terms. Thus the free, prior and informed consent of the Aboriginal and Torres Strait Islander Peoples is required.

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<sup>1</sup> Les Malezer, "Mabo and the Framework of Dominance", *National Indigenous Times*, 10 Oct, 2012.

<sup>2</sup> The Indigenous Land Fund is not specifically prescribed for this purpose and in any event the amount is insufficient as a remedy.

## Recommendations

1. **Beyond the limited issues raised in this ALRC Review, Congress supports a comprehensive review of the Act by the Attorney-General's Department, designed to achieve implementation of the rights set out in the Declaration.**
2. **Congress supports the introduction of a presumption of continuity, which would ensure that the onus rests with the respondent to prove a substantial interruption to connection.**
3. **Congress supports an amendment to the Act to allow Courts to disregard substantial interruption where it is in the interests of justice to do so.**
4. **Congress supports the introduction of a definition of 'substantial interruption' and a non-exhaustive list of colonial historical events to be disregarded.**
5. **Congress supports the legislative confirmation that connection with land and waters does not require physical occupation, or continued or recent use.**
6. **Congress is supportive of a broad definition of 'traditional' not tied to an artificial concept of culture frozen in time at the moment of British sovereignty.**

## Applicable Articles under the United Nations Declaration on the Rights of Indigenous Peoples

9. The Declaration is a central focal point for the rights of Aboriginal and Torres Strait Islander Peoples, as it refines and collects together rights set out in other human rights instruments and treaties to which Australia is a party.<sup>3</sup> Listed below are the Articles under the Declaration that relate directly to land rights.

### *Article 25*

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

### *Article 26*

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

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<sup>3</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 107<sup>th</sup> plen mtg, UN Doc A/RES/61/295 (adopted 13 September 2007). Australia endorsed the Declaration on 3 April 2009.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

#### *Article 27*

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

#### *Article 32*

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

## Native Title Act Reform must be Reflective of International Human Rights Law

10. Congress supports the ALRC's principled approach to the review of the Act, ensuring that recommendations made are consistent with Australia's international obligations in relation to Aboriginal and Torres Strait Islander Peoples, particularly the Declaration.<sup>4</sup>

11. However, we are cognisant that despite repeated calls from UN treaty bodies for the Act to be amended to reduce the high evidentiary requirements that prevent many Aboriginal and Torres Strait Islander Peoples from regaining control of their traditional lands, successive Australian governments have failed to move beyond piecemeal amendments.

12. Examples from recent UN reports include:

*Universal Periodic Review, UN Human Rights Commission*

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<sup>4</sup> Australian Law Reform Commission, *Review of the Native Title Act 1993*, (Issues Paper, Sydney, NSW: March 2014), 20.

86.102 Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life ...<sup>5</sup>

#### *Committee on the Elimination of Racial Discrimination*

*Reiterating in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, and the fact that despite a large investment of time and resources by indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5). The Committee urges the State party to provide more information on this issue, and to take the necessary measures to review the requirement of such a high standard of proof. The Committee is interested in receiving data on the extent to which the legislative reforms to the Native Title Act in 2009 will achieve “better native title claim settlements in a timely manner”. It also recommends that the State party enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources.*<sup>6</sup>

#### *Human Rights Committee*

*The Committee, while welcoming recent reforms, notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee’s recommendations adopted in 2000. (arts. 2 and 27) The State party should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples.*<sup>7</sup>

*Please note: underlining added for emphasis.*

13. Congress draws distinction between the requirements of the Act, which merely extend to clarifying where land ownership of our Peoples might have survived the imposition of British and Australian law over our territories, combined with the additional requirement to provide evidence of continued customary practices; in contrast to the human rights standard, requiring independent and balanced adjudication of the rights of the Aboriginal and Torres Strait Islander Peoples.

14. Significant amendment is required to the Act to comply with the human rights standard. Congress requests an amendment to the Act that would require adherence to the international human rights obligations of Australia, acknowledge the Declaration and insert a requirement to have regard to specific principles embodied in the Declaration into the objects of the Act.

15. Furthermore, the Act would benefit from a comprehensive review by the Attorney-General’s Department designed to achieve implementation of the rights set out in the Declaration. Such review would necessarily require scrutiny and analysis of some fundamental features of the Act such

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<sup>5</sup> Report of the Working Group on the Universal Periodic Review: Australia, 17<sup>th</sup> sess, UN Doc A/HRC/17/10 (24 March 2011), para 86.102.

<sup>6</sup> Concluding Observations by the Committee on the Elimination of Racial Discrimination: Report on Australia, UN Doc CERD/C/AUS/CO/15-17.8, (13 September 2010) para 18.

<sup>7</sup> Concluding Observations of the Human Rights Committee: Australia, UN Doc CCPR/C/AUS/CO/5, (7 May 2009) para 16.

as fair and independent adjudication of disputes over the lands, territories and resources of the Aboriginal and Torres Strait Islander Peoples, the present limitations and impediments upon the rights to redress or compensation, the control over development on Aboriginal and Torres Strait Islander lands or territories, and the right to ownership, control and benefit from development or utilisation of natural resources.

### Presumption of Continuity, Substantial Interruption and Physical Connection Continued or Recent Use

16. Congress supports the reversal of the burden of proof, fair and just interpretation of substantial interruption and legislative confirmation that connection with land and waters does not require physical connection. As reported by UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya:

*“the Declaration effectively rejects a strict requirement of continuous occupation or cultural connection from the time of European contact in order for indigenous peoples to maintain interests in lands, affirming simply that rights exist by virtue of “traditional ownership or other traditional occupation or use” (Art. 26).”<sup>8</sup>*

17. This commentary speaks to ongoing injustice felt by Aboriginal and Torres Strait Islander Peoples who have been unable to regain their traditional lands due to prohibitively high judicial tests, weighted particularly against those Peoples most affected by colonial dispossession.

18. Congress continues to advocate for the reversal of the burden of proof in relation to continuity of connection and supports the introduction of a presumption of continuity, which would ensure that the onus rests on the respondent to prove a substantial interruption to connection.

19. We believe that the current onus of proof mechanism is racially discriminatory as it rests on Aboriginal and Torres Strait Islander Peoples to claim and prove that we have customary connection to our territories. It also prevents Aboriginal and Torres Strait Islander Peoples from exercising and enjoying our rights and freedoms. This procedural requirement merely serves as a barrier to justice and an ongoing defensive mechanism for shielding the historical theft of lands, territories and resources.

20. The law requires no evidence by the government or other stakeholders to demonstrate that they have lawfully acquired property and development rights from the Aboriginal and Torres Strait Islander Peoples. Nor does it contemplate remedy or compensation for the historical injustices in taking the lands, territories and resources from the original owners.

21. In the situation where a substantial interruption may counter a presumption of continuity, Congress supports an amendment to the Act to allow Courts to disregard such a substantial interruption where it is in the interests of justice to do so.

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<sup>8</sup> J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th sess, UN Doc A/HRC/15/37/Add.4 (1 June 2010) para 29.  
<http://unsr.jamesanaya.org/country-reports/report-on-the-situation-of-indigenous-peoples-in-australia-2010>

22. Congress supports the introduction of a definition of ‘substantial interruption’ and the Australian Human Rights Commission’s suggestion of a non-exhaustive list of colonial historical events to be disregarded, such as the stolen generation and the forced relocation of Aboriginal and Torres Strait Islander Peoples onto reserves and missions.<sup>9</sup>

23. Congress supports the legislative confirmation that connection with land and waters does not require physical occupation, or continued or recent use. Instead the focus of a question around connection should be whether the claimant group has continued to acknowledge and observe its traditional laws and customs as outlined below.

### The Meaning of Traditional

24. Congress is supportive of a broad definition of ‘traditional’ not tied to an artificial concept of culture frozen in time at the moment of British sovereignty. A definition of traditional that does not acknowledge the natural evolution of culture and change under British and Australian governments, is discriminatory to Aboriginal and Torres Strait Islanders Peoples as it persecutes our Peoples for matters outside of our control. Furthermore, such a conception of traditional is antithetical to the right for Indigenous Peoples to ‘*maintain, protect and develop the past, present and futures manifestations of their cultures*’.<sup>10</sup>

### Native Title Rights and Interests of a Commercial Nature

25. Congress supports the inclusion of native title rights and interests of a commercial nature in the Act. A narrow reading of native title rights and interests, excluding commercial interests, is inconsistent with the Declaration. Aboriginal and Torres Strait Islander Peoples have the right to self-determination through the pursuit of economic development,<sup>11</sup> and the right to develop their lands, territories and resources.<sup>12</sup>

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<sup>9</sup> Aboriginal and Torres Strait Islander Social Justice Commission, Australian Human Rights Commission, *Native Title Report 2009* (Sydney, 2009) 87.

<sup>10</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 107th plen mtg, UN Doc A/RES/61/295 (adopted 13 September 2007), art 11.

<sup>11</sup> *Ibid*, art 3.

<sup>12</sup> *Ibid*, art 26.