Response to the

Australian Law Reform Commission

Review of the Native Title Act 1993

Discussion Paper

January 2015

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. As the national Aboriginal and Torres Strait Islander People's representative body, it is our purpose to ensure that the rights of the Australia's First Peoples are promoted and protected, and to advocate for solutions to the injustices, disadvantages and impediments that continue to obstruct the development of our Peoples.

3. Congress takes this opportunity to comment on the Australian Law Reform Commission's (ALRC) Discussion Paper for the Review of the Native Title Act 1993 (the Discussion Paper). This statement should be read in conjunction with Congress response to the former Issues Paper for said review.

The United Nations Declaration on the Rights of Indigenous Peoples

4. The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) provides that States are to establish and implement a 'fair, independent, impartial, open and transparent process…to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources.'[1] The Australian Government formally endorsed the Declaration on April 3, 2009. Although outside of the bounds of this review, Congress supports an amendment to the Native Title Act (NTA) which 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 NTA.

5. Additionally, the NTA would benefit from a comprehensive review by the Attorney General's Department designed at achieving implementation of the rights set out in the Declaration. Such a review would necessarily require scrutiny and analysis of some fundamental features of the NTA; such as the present limitations and impediments upon the rights to compensation, the lack of any right to veto development or extinguishment, and the right to ownership, control and benefit from natural resources.

The Presumption of Continuity

6. Congress reiterates that the introduction of a presumption of continuity is a matter of social justice, reversing the current discriminatory status quo.[2] Congress disagrees with the ALRC's decision not to propose a presumption of continuity. The core reasoning relied upon by the ALRC is that a substantial benefit cannot be demonstrated to outweigh the potential disadvantages highlighted by vested interests.[3]

7. We believe that the disadvantages are overstated, with the majority of arguments favouring the interests of State and Territory governments. In light of the 'beneficial nature' of the NTA, great

[1] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (annex), UN Doc A/RES/61/295 (2007), art 27.
[2] National Congress of Australia's First Peoples, *Statement to the Australian Law Reform Commission Review of the Native Title Act 1993*, (Redfern: June, 2014).
[3] Australian Law Reform Commission, *Review of the Native Title Act 1993: Discussion Paper* (Sydney: Commonwealth of Australia, October, 2014), 86.

weight must be afforded to the increased accessibility to justice flowing from the reduction in costs to claimants that would result from a reversal of the burden of proof. If as stated in the Discussion Paper, the majority of determinations are resolved by consent,[4] then the introduction of a presumption of continuity will result in an overall reduction of time and costs for claimants.

8. Congress is not satisfied with the proposition that the introduction of a presumption of continuity will be detrimental because State or Territory Governments may be less willing to agree to consent determinations. The argument misses the point that the objective here is to shift the balance of bargaining power to the claimants and reduce their costs. If a State or Territory party does not feel that sufficient material has been supplied they are in a better position than claimant groups to finance further research. The State or Territory party may find through such research that they can be satisfied and agree to a consent determination. It would be make little budgetary sense if respondent parties, that previously would have agreed to consent decisions, vindictively challenged with rebuttals and drawn out litigation because of a shift in evidentiary costs.

9. Congress acknowledges that projected savings of time and resources that are sought with the introduction of a presumption of continuity are reliant on respondent parties choosing not to rebut. However, cases that previously would have been litigated, would continue to be litigated. A situation exists where some State or Territory governments seek to litigate where others have a policy of negotiating with the interests of Aboriginal and Torres Strait Islander Peoples in mind. Those respondents who are already agreeing to consent determinations, have it in their financial interests to pay for the research to satisfy their due diligence requirements.[5] If the majority of determinations are by consent, than across the system there will a net benefit to claimants as costs are shifted to respondents.

10. State and Territory governments also claimed that a presumption of continuity may promote applications by those who do not hold traditional rights in an area, and affect the quality of evidence brought before the Court. Congress agrees that if these situations continue to arise, as they currently do, these are issues that the Courts are well equipped to deal with.

11. The ALRC also raised reservations relating to the control of evidence by claimants where a presumption of continuity exists. It was suggested that where a State or Territory government respondent seeks to rebut a presumption, state-commissioned researchers would be required to gather evidence from claimants and this could 'undermine the cohesion within Indigenous communities'.[6] Situations already exist where native title claims have created conflicts in communities,[7] and it is a matter for Aboriginal and Torres Strait Islander People to regulate within our communities how native title processes are engaged with. Similarly, the South Australian Government argued that claimant groups would be 'unlikely' to release information 'if it were for the State to disprove presumptions of continuity'.[8] We believe claimants will in most cases collaborate in good faith because it is in their interests to progress their native title claims.

[4] Ibid, 86.
[5] Ibid, 87.
[6] Ibid, 88.
[7] Australian Human Rights Commission, *Submission to the ALRC: Review of the Native Title Act 1993* (Sydney: May, 2014), 11.
[8] Australian Law Reform Commission, *Review of the Native Title Act 1993: Discussion Paper*, 89.

12. Congress believes that given the beneficial purpose of the Act and the 'increased preparedness' of State and Territory respondents to draw inferences in the context of agreeing to consent determinations, leading to effective 'unstated "presumptions of continuity"' in some regions, it is a logical next step to introduce a presumption of continuity. [9]

Physical Occupation

13. On further review Congress is satisfied that the courts have consistently acknowledged that evidence of recent use, occupation or physical presence is not necessary for the identification of native title rights and interests. Given the unnecessary uncertainty and litigation that may be caused by statutory confirmation, Congress is supportive of the ALRC position that an amendment is not required to confirm in legislation that connection with land or waters requires evidence of 'physical occupation or continued or recent use'.[10] In the interests of consistency, Congress supports proposals 6-1 and 6-2 to remove references to 'traditional physical connection' in sections 62(1)(c) and 190B(7) of the NTA.

Traditional Laws and Customs

14. In our statement in response to the Issues Paper of the current review, Congress recommended a 'broad definition of traditional not tied to an artificial concept of culture frozen in time at the moment of British Sovereignty'. Consequently, Congress is supportive of the ALRC's Proposals 5-1, 5-2, 5-3, and 5-4.

Substantial Interruption

15. In the Congress statement to the Issues Paper, we recommended:

- an amendment to the Act to allow Courts to disregard substantial interruption where it is in the interests of justice to do so; and
- the introduction of a definition of 'substantial interruption' and a non-exhaustive list of colonial historical events to be disregarded.

16. Proposal 5-3 only addresses the level or frequency of continuity of acknowledgement and observance of traditional laws and customs under s 223(1)(a). In contrast, the recommendations at paragraph 15 are concerned with s 223(1)(b) and the effects European settlement may have had in impairing the ability for our Peoples to continue connection to land and waters by those laws and customs.

17. Congress is adamant that the proposals have not gone far enough and in response to questions 7-3 and 7-4, the Courts must have capacity to take into account displacement, caused by direct or indirect effects of European Settlement, when assessing whether Aboriginal and/or Torres Strait Islander Peoples have a connection with land or waters. Where the effects of colonisation have caused substantial interruption to connection that our Peoples have with their lands and waters, the Court must have the discretion to disregard such interruptions.

[9] Ibid, 90-93.
[10] Ibid, 118.

18. The ARLC decided not to propose reforms along the lines of those in the issues paper, i.e. the models that use the language of 'empowerment' and the statutory definition of 'substantial interruption'. While Congress stands by our earlier recommendations, we are open to other models that may achieve the same goals. However, we do not have capacity to critique the example given in question 7-5.

Commercial and Cultural Rights

19. Congress has previously stated that we support amending the NTA to clarify that native title rights and interests can be of a commercial nature.[11] This would align with the Declaration's affirmation of the right to self-determination and the right of Aboriginal and Torres Strait Islander people to 'freely determine their political status and freely pursue their economic, social and cultural development.' As a result Congress strongly supports proposal 8-1:

- Section 223(2) of the NTA should be repealed and substituted with a provision that provides:
    - Without limiting subsection (1) but to avoid doubt, ***native title rights and interests*** in that subsection:
        - (a) comprise rights in relation to any purpose; and
        - (b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.

Protection and Exercise of cultural knowledge

20. Congress strongly advocates for Article 31 of the Declaration to be upheld; ensuring the right of Aboriginal and Torres Strait Islander Peoples to 'maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.'[12] In response to question 8-1, it is entirely appropriate to include the protection and exercise of cultural knowledge under the indicative listing of native title rights and interests in s 223(2) of the Act.

[11] National Congress of Australia's First Peoples, *Statement to the Senate Legal and Constitutional Affairs Legislation Committee on the Inquiry into the Native Title Amendment (Reform) Bill 2011*, (Redfern: October, 2011). National Congress of Australia's First Peoples, *Statement to the Attorney-General on the Native Title Amendment Bill 2012 Exposure Draft*, (Redfern: October, 2012).
National Congress of Australia's First Peoples, *Statement to the Australian Law Reform Commission Review of the Native Title Act 1993*, (Redfern: June, 2014).

[12] *United Nations Declaration on the Rights of Indigenous Peoples,* art 31.