Statement to the

Attorney General

on the

Native Title Amendment Bill 2012

Exposure Draft

NATIONAL CONGRESS
OF AUSTRALIAS FIRST PEOPLES

October 2012

STATEMENT

by

National Congress of Australia's First Peoples

to

the Attorney General of Australia

Native Title Amendment Bill 2012 ("the Bill")

Executive Summary

1. The National Congress of Australia's First Peoples (Congress) is the national representative body for Aboriginal and Torres Strait Islander Australians. Congress is an independent national voice, a leader, an advocate, and a source of advice and expertise for First Peoples. Drawing strength from culture and history, Congress aims to bring equality, freedom, opportunity and empowerment to the First Peoples. We acknowledge and pay respect to our ancestors, our Elders and all Aboriginal and Torres Strait Islander people as owners of this ancient land.

2. Congress takes this opportunity to comment to the Attorney General on the Native Title Amendment Bill 2012. We are concerned that the proposed draft amendments to the Native Title Act ('the NTA') do not go far enough to ensure the rights and interests of Aboriginal and Torres Strait Islander people are recognised and upheld.

3. The Native Title system is not protecting Aboriginal and Torres Strait Islander property rights through recognised secure title to land.[1] Aboriginal and Torres Strait Islander peoples must have complete ownership rights and be able to maintain control over their historical and traditional lands. Twenty years after the momentous Mabo decision, the Government must take the opportunity to implement fundamental and meaningful reform. The proposed minor and technical amendments do little to improve the historical injustices and status quo as should be reasonably expected in the outcomes from the High Court's Mabo decision. Hundreds of registered claimant applications remain in the system and the proposed amendments do little to protect the rights for our elders who are dying before Native Title outcomes are reached.

4. Congress requires the Australian Government to fulfill its international obligations under the UN Charter, the human rights treaties and the *United Nations Declaration on the Rights of Indigenous Peoples* ('the Declaration'). Congress opposes legislation and policies which limit or remove the right to self- determination of peoples. We advocate for exercise of the right to self-government and autonomy in any matter which affects our peoples, our development and our futures. Any proposals for development on our territories or

[1] L Malezer, '*Mabo and the Framework of Dominance,*' National Indigenous Times(2012) Issue 286

exploitation of our resources must comply with the principle of free, prior and informed consent and related rights expressed in the Declaration.

5. Congress continues to reject the onus upon our peoples to bear the burden of proof in relation to our rights to own our lands, territories and resources. We believe that the current onus of proof mechanism is discriminatory and serves merely as a mechanism to deny justice for historical theft of lands, territories and resources as it requires Aboriginal and Torres Strait Islander people to claim and prove that they had customary connection to their territories but requires no evidence by the government or other stakeholders to validate their claims to have lawfully acquired their property and development rights. It prevents Aboriginal and Torres Strait Islander people from exercising and enjoying most of our rights and freedoms.

(i) The Declaration on the Rights of Indigenous Peoples

6. 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.'[2] The Australian Government formally endorsed the Declaration on April 3, 2009. Congress supports an amendment to the NTA which would require adherence to the international human rights obligations of Australia, acknowledge the Declaration on the Rights of Indigenous Peoples and insert a requirement to have regard to specific principles embodied in the Declaration into the objects of the NTA.

7. Separate to its obligations under the Human Rights (Parliamentary Scrutiny) Bill, 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 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.

8. The United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has made various findings that the Native Title law in Australia is racially discriminatory and in breach of its' obligations under international law. In his report to the Human Rights Council in 2009, [3]the Special Rapporteur stated:

> '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). Also incompatible with the Declaration, as well as with other international instruments, is the extinguishment of indigenous rights in land by unilateral uncompensated acts. Contrary to the doctrine of extinguishment, the Declaration (art. 28) affirms that "indigenous peoples have the right to redress, by means that can include restitution or,

[2] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (annex), UN Doc A/RES/61/295 (2007), art 27

[3] James Anaya, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Situation of indigenous people in Australia,* A/HRC/15/137/Add.4 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/138/87/PDF/G1013887.pdf?OpenElement (viewed 15 October 2012)

when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

(ii) Failure of the Native Title system

9. Within the native title system, the rights of Aboriginal and Torres Strait Islander people remain impeded by the onerous burden of proof, the injustices of extinguishment and the weakness of the good faith requirements.

10. The 1998 amendments brought many discriminatory provisions into Australian law, resulting ultimately in the failure of the Native Title Act to work for the benefit of the Aboriginal and Torres Strait Islander people.[4]

11. The native title system has proved to be disappointing and frustrating for Aboriginal and Torres Strait Islander people who are entitled to have capacity and control of our own institutions and to autonomous funding. Instead, the government has controlled Native Title Representative Body structures through legislation, funding and contracts. This has greatly inhibited the control that Aboriginal and Torres Strait Islander people have regarding the work of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) which are limited in funding[5]. Aboriginal and Torres Strait Islander people therefore have insufficient access to expert advice—upholding the imbalance in negotiation procedures between native title parties.

12. Congress maintains that any changes to the Native Title Act must be supported by an increase of funding to NTRBs and NTSPs.

13. Congress supports the position of the Law Council of Australia which states 'the Act requires significant amendments to ensure native title claimants are on a level playing field with well-resourced mining companies and state governments, which contest native title claims.[6]'

(iii) Onus of Proof

14. Congress continues to advocate for easing the burden of proof in relation to continuity of connection. We believe that the current onus of proof mechanism is discriminatory as it rests on Aboriginal and Torres Strait Islander people to claim and prove that they had customary connection to their territories. It also prevents Aboriginal and Torres Strait Islander people from exercising and enjoying our rights and freedoms.

15. 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.

(iv) Commercial Rights and Interests

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[4] L Malezer, *Mabo Lecture*, AIATSIS Native Title Conference, 3-5 June 2009 http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2009/papers/MaboLecture.pdf

[5] *ibid*

[6] Law Council of Australia, Media Release, 2 June 2012, *Law Council calls for native title reform on the eve of Mabo ruling 20th anniversary* www.lawcouncil.asn.au

16. Congress supports amending the NTA to clarify that native title rights and interests can be of a commercial nature. 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.' We anticipate the outcome of the appeal in *Akiba v State of Queensland* in the High Court which directly raises the question of whether or not Torres Strait Islander customary rights to fish for commercial purposes have been extinguished by State or Commonwealth fisheries legislation.

(v) Sea Country

17. Congress maintains that further amendments are required to the NTA in relation to Sea Country. Aboriginal and Torres Strait Islander people have equal regard, connection, ownership, uses and responsibilities for their sea country as they do their lands.[7] The present form of s 26 of the NTA creates an anomaly whereby the procedural rights attached to the lands are not attached to the sea country in this regard.

18. Congress supports the repeal of s 26(3) of the NTA.

(vi) Effective Cultural heritage protection

19. Fundamental shifts in cultural heritage protection legislation in the various State jurisdictions have given rise to considerable concern within our members and partner organisations. In Queensland, New South Wales and Victoria at least, cultural heritage protection legislation has moved from regimes which were wholly regulated by the State to a 'duty of care' model where proponents assume the risk and liability of not taking reasonable steps to protect and manage Aboriginal cultural heritage.

20. In New South Wales, the duty of care obligations will have been satisfied by a proponent who carries out a search of the government operated sites register.[8] Congress maintains that Aboriginal and Torres Strait Islander people are protective of the information they hold about site location, and the process whereby a site register is searched is not an appropriate means to ensure "effective" protection.

21. Congress strongly advocates for Article 31 of the Declaration to be upheld— ensuring the right of Aboriginal and Torres Strait Islander people to 'maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.'

Native Title Amendment Bill 2012 (Exposure Draft)

22. Noting that the proposed draft amendments to the NTA do not go far enough to ensure the rights and interests of Aboriginal and Torres Strait Islander people are recognised and upheld, Congress provides the following response to the amendments proposed in the Exposure Draft:

[7] See the submission of the Torres Strait Regional Authority to the Senate Legal and Constitutional and Constitutional Affairs Committee on the Inquiry into the *Native Title Amendment (Reform) Bill* 2011.
[8] Sections 87(2) and 90Q *National Parks and Wildlife Act* 1974 (NSW)

(vii) Historical Extinguishment

23. The proposed amendments are beneficial to native title claimants in the sense that they allow historic extinguishment over parks and reserves to be disregarded in certain circumstances where there is agreement between the parties that it should be disregarded. Disregarding extinguishment in these circumstances is presently not permitted by the NTA. In this way, the proposed amendments would add to the overall stock of land and waters available for the establishment of native title rights and interests.

24. However, Congress questions the extent and effectiveness of these amendments. We are concerned that s 47C requires *an agreement* with the Commonwealth, State or Territory before extinguishment can be disregarded. There is no apparent reason why s 47C should be drawn in this manner and not be put on the same footing as the other companion sections, all of which require that extinguishment "must be disregarded" where the section is engaged (ss 47(2), 47A(2) & 47B(2)).

25. In these circumstances, the usefulness of s 47C will depend on the goodwill and political complexion of the government parties with the undesirable result that outcomes are likely to vary across the States and Territories.

26. The approach taken in the Exposure Draft may be contrasted with that taken in the Native Title Amendment (Reform) Bill (no.1) 2012 introduced by Senator Siewert (the Green's Bill'). Under s 47C(2), as proposed in that Bill, extinguishment *must* be disregarded where the section is engaged. Further, s 47D, as proposed in the Greens' Bill, would permit *any* extinguishment to be disregarded by agreement, not simply the limited kinds of extinguishment contemplated in Schedule 1 of the Exposure Draft.

27. A simpler way of introducing the changes that underlie s 47C would be to amend s 47B so that its operation extends to parks and reserves. This could be done by providing that the setting aside, granting or vesting of land for the purposes of a park or reserve operates as an exception to the current restriction in s 47B(1)(b)(ii) which provides that the section does not apply if the land is set aside for public or particular purposes.

28. Congress is concerned that it appears that the relevant agreement needs to be in existence at the time the application is made (see item 4 proposing amendments to s 61A(4)(b) to refer to the new s 47C). For instance, s 47C can only be said to apply if there is an agreement in place (s 47C(1)(c). It is more appropriate for parties to be able to take advantage of the proposed s 47C *after* the making of a claimant application.

29. Further, the prior extinguishment that may be disregarded by agreement appears to be an all or nothing affair (s 47C(7), especially the words "any extinguishment" and part (b)). However, there may be situations where the parties wish to agree that only some prior extinguishment should be disregarded.

30. Congress submits that there is no apparent reason why public works on land or waters to which ss 47, 47A or 47B apply should be treated any differently to the land or waters themselves. This is especially so when the relevant sections preserve the interests of government (ss 47(3)(a)(ii), 47A(3)(a)(iii) & 47B(3)(a)(ii)). Accordingly, the regime established by s 47C for disregarding the extinguishing effects of public works by agreement should also extend to land or waters to which ss 47, 47A or 47B apply.

31. In *Erubam Le v State of Queensland*, it was held that s 47A of the NTA did not require that the extinguishing effects of public works be disregarded[9]. The ability to disregard such extinguishment by agreement would be particularly useful in the context of historic public works that are no longer of value to the relevant government or statutory authority.

(viii) Negotiations

32. As noted, the current statutory arrangements regarding negotiations are ineffective as Aboriginal native title claimants do not have equal footing in negotiations.

33. The determinations made by the arbitral body tend heavily to favour mining companies. In many instances, the expiry of the six month negotiation period under s 35(1)(a) of the NTA leads to an application to the NNTT for a determination under s38 without genuine participation in negotiations.

34. The proposed new s 31A(3) spells out that the good faith negotiation requirements do not require a negotiation party to make concessions or reach agreement. Item 7 extends the negotiation period from six to eight months. Congress maintains that mining companies who are prepared to stonewall for six months would also be prepared to delay for eight months and that a longer time frame should be considered.

35. The sanction for non-compliance with the good faith negotiation requirements is to be found in item 8. Under this item, the existing s 36(2) of the NTA would be repealed and new provisions ss36(2) and 36(2A) would be inserted. Sub-section 36 (2) is the primary provision. It provides:

> The arbitral body must not make the determination unless the negotiation party that made the application under section 35 for the determination satisfies the arbitral body that the negotiation party negotiated in accordance with the good faith negotiating requirements (see section 31A) until the application was made.

36. Placing the onus on the mining company to prove good faith is welcomed as it involves a substantial change from the current s 36(2) which places the onus on the party asserting a lack of good faith. However, Congress supports the higher standard of good faith negotiation procedures as outlined in the Greens' Bill as compared with the Exposure Draft. For instance:

    (1) the Greens' Bill requires the parties to "actively" participate (s 31(1A)(a)), whereas the Exposure Draft requires only *participation* (s 31A(2)(a));

    (2) the Greens' Bill contemplates, where reasonably practicable, meetings "at a location where most of the members of the native title parties reside, if so requested by them" (s 31(1A)(a)), whereas the Exposure Draft is silent on the location of meetings;

    (3) the Greens' Bill requires that responses to proposals must be in a "detailed manner, including providing reasons for the relevant response" (s 31(1A)(e)), whereas the Exposure Draft does not include this.

37. Congress submits that the wording of the proposed s 36(2) needs revision. The words "until the application was made" should be deleted as they provide mining companies with the

[9] (2003) 134 FCR 155, at Questions 1 and 2 and the answers thereto, and at [84]-[90]

opportunity to bring an application as soon as the eight month period has expired. The good faith negotiation requirements should continue to apply until the making of any determination by the arbitral body.

38. We also maintain that the proposed amendments in Schedule 2 will not adequately solve many of the current problems associated with native title negotiations. Instead, Congress advocates for the repeal of s 38(2) of the NTA, on the basis that, in a large proportion of matters, it robs the native title holders or registered native title claimants of any real negotiating position.

39. There is an urgent need for increased resourcing of NTRBs and NTSPs so that they have a sufficient number of appropriately qualified and experienced professional staff and sufficient resources to engage expert consultants in respect of negotiations as appropriate. This would address the present imbalance whereby there appears to be no level playing field between and mining companies.

(ix) Indigenous Land Use Agreements

40. Congress believes that there are various amendments to the NTA which would allow for better outcomes for Aboriginal and Torres Strait Islander people—particularly with regard to ILUAs. ILUAs have led to very positive outcomes in certain cases, particularly where a large mining operation is under consideration by a multinational company, but the majority of these agreements are superficial and do not leave Aboriginal and Torres Strait Islander communities with capacity to develop or progress into the future.[10]

41. Many, if not most of the agreements do not resolve Aboriginal or Torres Strait Islander ownership of their territories but simply become authorisations for mining or other developments to occur in territories under claim.

42. Congress maintains that mining agreements are getting particular attention because impressive amounts of monetary incentives, job training and contracts are included and offered to communities in exchange of a clearance of a mining development. These cash agreements can be impressive to poor communities but often amount to little more than a "buy out" of the Aboriginal and Torres Strait Islander rights and interests. The cash payments are generally unlikely to lead to true economic development or sustainable operations for the community.

43. Further, the benefits from mining such as royalties over the minerals are not generally distributed to local Aboriginal and Torres Strait Islander communities.

44. The amendment at item 3 of Schedule 3 of the Exposure Draft extends the operation of s 24BC so as to cover the situation where, in addition to there being a positive determination of native title, there is also determination that native title has been extinguished in relation to part of the area. Congress agrees that this amendment allows greater flexibility and supports it.

45. In relation to the amendments at items 1 and 4 of Schedule 3, Congress seeks clarity as to what kind of applications other than native title determination applications and

[10] L Malezer, '*Mabo and the Framework of Dominance,*' National Indigenous Times(2012) Issue 286

compensation applications are intended to be covered in relation to (1*) the making or not making or applications, including applications under Division 1 of Part 3 in relation to the area.*

46. In relation to (2) *the operation of s211 in relation to the area,* it is not clear what kind of agreements these provisions are intended to authorise. The Explanatory Statement is obscure on this point (p.5). Section 211 of the NTA is an important provision which works in conjunction with s 109 of the Constitution. It confers considerable benefit on Aboriginal and Islander peoples in terms of making lawful what would otherwise be unlawful under State or Territory legislation. In short, it permits Aboriginal and Islander people to do certain things by way of hunting, fishing, gathering and the like without having to obtain a licence, permit or other instrument to do so[11].

47. With regards to pars 24BB(ad) and 24CB(ad), Congress seeks clarification from the Attorney General's Department about the kinds of agreements the provisions are intended to authorise. It is not clear whether any intention exists to permit any contracting out of the operation of s211 and this would not be in the interests of Aboriginal and Torres Strait Islander people. A statement to this effect could be included in the Explanatory Memorandum.

48. The Explanatory Statement says that the Government is keen to improve the efficiency of the registration process for subdivision C ILUAs (area agreements), while also maintaining its integrity. At present, objectors to the registration of area agreements have three months in which to object. Under the proposed amendments, that period would be reduced to one month (par 24CH(2)(d). The reduction of the period may have the effect of unreasonably limiting the ability of potential native title holders to object to its registration. In some instances this would impact Aboriginal people whose first language is not English or whom live remotely. Congress does not support the reduction of the objection period to one month.

49. Congress is also concerned with the proposed s 24CI (1C) (item 9 of the Exposure Draft). This provision relates to requests by objectors to the registration of area agreements that the NNTT (or a recognised State/Territory body) to make available one or more of the following documents, namely the application, any documents supporting the application and any agreement. Section 24CI(1C) provides that the NNTT must give a copy of the document or documents to the objector (except where the information is found to be confidential or commercially sensitive) in circumstances where the NNTT "considers that it is reasonably likely that the objection would be withdrawn if the document or documents were made available.

50. Congress believes that it is difficult to justify not providing to the objector documents of the kind referred to that are not confidential or commercially sensitive.

Conclusions

51. Congress remains concerned that the proposed draft amendments to the Native Title Act do not go far enough to ensure the rights and interests of Aboriginal and Torres Strait Islander people are recognised and upheld.

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11 See, for example, *Yanner v Eaton* (1999) 201 CLR 351

52. The Native Title system is not protecting Aboriginal and Torres Strait Islander property rights through recognised secure title to land. Aboriginal and Torres Strait Islander peoples must have complete ownership rights and be able to maintain control over their historical and traditional lands. Congress requires the Australian Government to fulfill its international obligations under the UN Charter, the human rights treaties and the United Nations Declaration on the Rights of Indigenous Peoples.

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