NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES

Submission to the Inquiry into Reforms to the *Native Title Act 1993*

February 2018

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ABOUT THE NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES

Congress is a representative voice for Aboriginal, and Torres Strait Islander Peoples. Established in 2010, Congress has grown steadily and now consists of over 180 organisations and 9,000 individual members, who elect a board of directors.

Congress opposes legislation or policy that is, or may be, discriminatory (directly or indirectly) and/or may limit the rights of Australia's First Peoples. Many of the social problems faced by First Peoples today are the result of a history of coercive government policies, notably forced removal from land, relocation to reservations and missions, assimilation, Stolen Generations, Stolen Wages, and income management regimes.

Congress advocates self-determination, and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*. Congress believes Aboriginal, and Torres Strait Islander Peoples, should be central to decisions about our lives, and communities, and in all areas including our lands, and waters, health, education, law, governance, and economic empowerment. It promotes respect for our cultures and recognition as the core of the national heritage.

INTRODUCTION

Native title is a legal framework recognised by Australian common law in accordance with the *Native Title Act 1993* (Cth) ("the *Act*") which recognises the rights and interests held by Aboriginal and Torres Strait Islander peoples under our traditional customs and laws in relation to lands and waters.[1] It is critically important as a formal recognition of the histories, cultures and rights of First Peoples, and as a means of transforming "[our] relationship with governments from one of supplication to one of partnership, working together to take down the myriad of legal, social, governance and economic brick walls that have trapped so many into a life of bleak, unremitting hardship."[2]

National Congress stresses that the benefits of recognising Aboriginal and Torres Strait Islander ownership over our traditional lands and waters are not limited to our peoples' ability to pursue financial security and independence. Native title is also closely connected to the spiritual, cultural and social wellbeing of our communities due to the centrality of our country to our cultures and histories. It contributes to our sense of cultural safety, empowerment, and self-determination. As such, National Congress asserts that Aboriginal and Torres Strait Islander peoples must be given the means to independently govern the use of our traditional lands and waters, and that any lasting solution cannot merely be imposed upon us.

National Congress questions the value of this Inquiry, given that a number of the reform proposals contained in the Options Paper released by the Attorney-General's Department ("the Department") were recommended by both COAG and the Australian Law Reform Commission only a few years ago, but have yet to be legislated. We stress that the process of public consultation should not be used as an exercise to justify weakening Aboriginal and Torres Strait Islander land rights in the name of economic growth, processing efficiency or political expedience.[3] Such an approach would be deeply culturally insensitive, and National Congress sincerely hopes that the experiences and aspirations of our peoples will be accepted in good faith by the Department.

National Congress also expresses disappointment that the present Inquiry does not consider the need to make significant changes to the native title framework, and is instead restricted to procedural arrangements surrounding agreement-making and dispute and claims resolution.[4] We note that broad-ranging reforms are

[1] Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use* (Canberra: Council of Australian Governments, December 2015), 22.
[2] Krysti Guest, *The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements* (Acton: Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS'), October, 2009), 48.
[3] Senior Officers Working Group, *Investigation*, 5.
[4] Ibid.

required to fulfil Australia's obligations under the *UN Declaration on the Rights of Indigenous Peoples*,[5] given that currently, Aboriginal and Torres Strait Islander peoples lack any right to veto any mining or exploration activities, and the right to assert ownership and control from natural resources extracted from our lands.

SECTION 31 AGREEMENTS

Question 1: Should the Act be amended to confirm the validity of section 31 agreements made prior to the McGlade decision?

Section 31 agreements are primarily employed in granting mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights.[6] As such, they form a significant part of Aboriginal and Torres Strait Islander peoples' interaction with the native title framework. It is vital that this framework is designed to respect First peoples' position as the overseers of any economic development on our lands and waters, and to provide as much certainty as possible. Such recognition of our sovereignty contributes to our sense of self-determination and ensures that the benefits which stem from any development on our country are shared by our communities.[7]

National Congress stresses that designing the Section 31 agreements framework properly is particularly important given the uncertainty created by the decision in *McGlade v Native Title Registrar*,[8] which held that Indigenous Land Use Agreements (ILUAs) were invalid if not all members of the Registered Native Title Claimant were parties to it.[9] This uncertainty exacerbated the pre-existing problem of communities being vulnerable to manipulation and exploitation by mining companies.

National Congress agrees that amending the Act to validate all Section 31 agreements made prior to *McGlade*[10] is an appropriate means of dispelling the uncertainty surrounding those agreements. Legislative amendment would serve as a necessary procedural check, and harmonise the ILUA regime (which was amended last year) with that for Section 31 agreements. However, we stress that the interests of First Peoples with regards to Section 31 agreements must always trump those of mining companies. The protection of our cultural rights and sacred sites must come before the relative short term commercial aspirations of corporations.

Question 2: What should be role of the applicant in future section 31 agreements? Which of the three options, if any, do you prefer?

National Congress asserts that majoritarian decision-making procedures threaten the collective, communal nature[11] of First Peoples' ownership over our land. Simple majoritarianism ignores the complexity of native title rights, and has the potential to violate the rights of the minority – potentially 49% of individuals – in a native title claim group.[12] This is particularly significant given that conflict can occur among claimants given that different groups frequently possess differing relationships with, and creation stories surrounding, the same lands or waters in question. As a result, a majoritarian decision-making process may inherently discriminate against minority groups, if the majority collude or co-operate to vote against their interests. Such decisions may also have economic consequences, e.g. if the majority ceded water rights that the minority relied upon for their livelihood.

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[5] *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).
[6] Attorney-General's Department, *Reforms to the Native Title Act 1993 (Cth): Options Paper* (Canberra: Australian Government, November 2017), 4.
[7] Senior Officers Working Group, *Investigation*, 49.
[8] [2017] FCAFC 10 (2 February 2017) ('*McGlade*').
[9] Attorney-General's Department, *Options Paper*, 4.
[10] *McGlade v Native Title Registrar* [2017] FCAFC 10 (2 February 2017) ('*McGlade*').
[11] National Congress of Australia's First Peoples, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, (Redfern: March 2017), 5.
[12] Ibid.

National Congress further notes that there is a tendency to homogenise Aboriginal and Torres Strait Islander communities which are geographically proximate to one another. However, we stress that modern means of transportation obscure the fact that groups which existed "only 600 kilometres" from one another frequently developed cultures and practices in isolation, and therefore cannot be lumped together for the purposes of decision-making.

AUTHORISATION AND THE APPLICANT

Question 3: Would you support the proposals to:

(a) Allow claim group members to define the scope of the authority of the applicant?

National Congress is alarmed that, despite its significance as a facet of the native title determination and compensation processes, the issue of the scope of authority of the Applicant remains unresolved at the legislative level. We assert that claim group members should be empowered with the ability to define the scope of the applicant's authority. The authorisation process should serve as the basis of the applicant's legitimacy:[13] it must involve a recognition of the collective and communal nature of native title,[14] and actively involve our peoples in decisions relating to our lands and waters. In essence, an application for a native title determination or compensation can have no effect unless it is authorised by the claim group.

National Congress notes that at present, conflicts can arise between the claim group and the applicant due to informational asymmetries and miscommunications. There is frequently a disjuncture between the applicant's authority and the aspirations of the claim group due to a failure to reconcile legislation with the expectations of Aboriginal and Torres Strait Islander communities. For instance, although claim groups would rightfully expect to be consulted by the applicant on decisions related to native title determinations or compensation, applicants might point to their powers under s 62A of the *Act* to exercise complete control over applications. This confusion regarding the applicant's authority creates unnecessary time and the wastage of resources, and contributes to community tensions and frustration.

(b) Clarify that an applicant can act by majority unless the claim group specifies otherwise?

This proposal is incompatible with the communal relationship which Aboriginal and Torres Strait Islander peoples possess with our lands and waters. National Congress stresses that allowing an applicant to act by majority could lead to certain individuals' concerns being overlooked. Furthermore, we are concerned that the proposal could result in Elders being sidelined, and other violations of communities' laws and customs. If the Department is concerned about the possibility of delays caused by the requirement that decisions be made by consensus, it should seek to make attending meetings easier (by facilitating online meetings, providing transport to people living in remote communities, and so forth) instead of seeking to override the concerns of the minorities within claim groups.

National Congress asserts that as in relation to Section 31 agreements, a majoritarian decision-making process would be incompatible with the communal, collective nature of our peoples' relationships with our lands and waters which the native title framework seeks to uphold.[15] The fact that such a process would be overridden with the consent of the claim group is inconsequential. Many claim groups comprise of parties with different interests, meaning that the proposal could allow the majority of the claim group to authorise, within the meaning of s 251B of the *Act*, more of their own to act as the applicant for a native title determination or compensation. There is therefore a serious risk that the minority voices within claim groups could be drowned out entirely. Furthermore, informational asymmetries, unfamiliarity with native title legislation and a lack of access to legal services mean that even if a claim group wished to require a consenus-based decision-making process, they could be unaware of their right to do so.

[13] Australian Law Reform Commission, *Connection to Country*, 37, 291.
[14] Ibid 294, quoting *Strickland v Native Title Registrar* (1999) 168 ALR 242, 259-60, [57] (French J).
[15] Senior Officers Working Group, *Investigation*, 42.

As an aside, National Congress notes that the framing of Question 3(b) outlines a decision-making model, which would have to be applied across the board and is not nuanced in any fashion. It ignores the fact that several First Peoples communities have unique decision-making processes suiting their cultural contexts.

(c) Allow the composition of the applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances?

National Congress asserts that this proposal is yet another example of prioritising decision-making expediency over ensuring that the voices of Aboriginal and Torres Strait Islander peoples are properly heard. In seeking to bypass the operation of s 66B(1)(b) of the *Act*, which requires that the claim group unanimously authorises the member(s) applying under s 66B to make the application, the proposal ignores the importance of consensus-based decision-making as a means of recognising the communal and collective nature of native title.[16]

Sections 66B(1)(iii)-(iv) of the *Act* acknowledge that, as a result of conflict within the claim group arising, members of the applicant may be unwilling or unable to continue performing the functions of the applicant. National Congress stresses that this conflict should be resolved through the involvement of all members of the claim group, rather than the remaining members of the applicant. The rationale for this has already been largely detailed above: in short, majority interests within the claim group should not be vested with a greater degree of power merely as a result of their size. Indeed, there is a serious risk that the proposal could allow the remaining members of the applicant to remove any representation for a particular family or interest group entirely.

(d) Impose a statutory duty on the members of the applicant to avoid obtaining a benefit at the expense of native title holders?

National Congress is deeply concerned about the continued lack of any express duty under the *Act* of the applicant towards the claim group, particularly given the plenary powers given to the authorised applicant.[17] The relationship between the claim group and the applicant "has hallmarks of a fiduciary relationship,"[18] given that the applicant is acting for and on behalf of the true owners of any native title rights.[19] As such, the claim group is in a position of vulnerability in which it is reliant upon the applicant to comply with its consensus-based decision-making process, and frequently unaware of the conclusion of any agreements or determinations until they have already been concluded. In this light, there is a strong need to impose a statutory duty on the members of the applicant to avoid obtaining a benefit at the expense of the native title holders whom they have an obligation to represent.

National Congress stresses that there are a great many cases in which misconduct by members of the applicant has led to the diminution, or even extinguishment, of a claim group's rights. In *Gebadi v Woosup (No 2)*,[20] for instance, the applicant made an agreement with a mining company for a mining project to occur on Ankamuthi land without complying with the decision-making processes of the claim group; did not disclose this fact or any of the agreement's terms to the claim group; and used funds of roughly $370,000 intended for the benefit of the claim group wholly for an applicant's benefit. More broadly, members of different applicants have been offered money, overseas holidays, or motor vehicles to act against the interests of the claim groups whom they are supposed to represent.

This mirrors the inducements offered to some Aboriginal and Torres Strait Islander peoples to become non-claimant applicants under the *Act* to help ensure that native title over particular lands and waters is extinguished. National Congress is particularly concerned that in some cases, members of the applicant are

[16] Ibid.
[17] *Act* s 62A; Australian Law Reform Commission, *Connection to Country*, 295, citing *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA 828 (6 August 2010) [32] (Collier J).
[18] Australian Law Reform Commission, *Connection to Country*, 314, quoting *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013) [61] (Rares J).
[19] Ibid 314, quoting *Lampton on behalf of the Juru People v Queensland* [2014] FCA 736 (11 July 2014) [34] (Rares J).
[20] [2017] FCA 1467 (7 December 2017).

bribed to not challenge non-claimant applications within the prescribed three-month window, securing the extinguishment of the native title of their authorising claim groups.

As such, National Congress agrees that a strong deterrent against fraudulent conduct by members of the applicant must be created through the legislation of an explicit, negatively-framed statutory duty. Such a duty should be broadly framed to capture the widest possible range of misconduct. As such, we are largely supportive of the duty as it is framed in the Options Paper, but seek to add that the members of the applicant should be required to avoid "a position where their private or personal interests came into conflict with the interests of the members of the [relevant]… claim group," and, should there be a determination of native title, the relevant native title holders.[21] This removes the risk of regulatory creep into our communities' right to self-governance, since the duty focuses on "private or personal interests"[22] rather than those accruing purely from the person's status as a member of the claim group. This is necessary given the reality that many claim groups are quite small and closely knit, meaning that members of the applicant will inevitably encounter conflicts of interest through that role versus their membership of the claim group.

AGREEMENT-MAKING AND FUTURE ACTS

> *Question 4: Do you support the creation of an alternative agreement-making mechanism? If so, what limitations would you seek to have applied to such an agreement? Alternatively, does the native title system currently allow for adequate flexibility in agreement-making?*
> *Are there better ways to achieve the objectives of increasing flexibility in agreement-making and reducing transaction costs can be achieved (for example, through the COAG Investigation recommendations outlined in Attachment B)?*

National Congress is wary of attempts to undermine Aboriginal and Torres Strait Islander peoples' cultures and practices under the guise of "alternative" agreement-making mechanisms targeting efficiency and flexibility gains. We stress that the present framework should be maintained such that none of the safeguards of our peoples' rights are legislated away or eroded in negotiations under new types of agreement. Furthermore, we note that the issue of timeliness should be solved not by removing protections for our peoples, but rather by investing in capacity-building for claim groups to assist them in navigating the native title framework.

Creative alternative agreement making processes that are of universal application can lead to cultural insensitivity and poor regulation. This is because they are not appropriately tailored to the dynamics and practices of particular communities, especially given the wide variance amongst Aboriginal and Torres Strait Islander communities with regards to what constitutes sound leadership and agreement-making. Furthermore, the additional jurisdiction that would be given to the National Native Title Tribunal and the FCA to enable them to assess the compliance of our communities with any new agreement-making frameworks would allow for further intrusion into our peoples' cultures and practices, furthering our sense of disempowerment.

With regard to alternative settlement frameworks outside the *Act*, National Congress strongly disapproves of those mimicking the *Traditional Owner Settlement Act 2010* (Vic), whereby First Peoples in Victoria sign non-native title settlements with the Victorian Government that include an undertaking from the former to withdraw native title claims, and agree not to make a future claim.[23] Our disapproval stems from the law barring traditional owners from accessing the certainty, and security, of the formal claims resolution process handled by the National Native Title Tribunal, and the Federal Court of Australia. National Congress fears that an alternative agreement mechanism such as this could be used 'to induce Aboriginal people and Torres Strait Islanders to accept lesser rights than they would be entitled to in a native title determination'.[24]

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[21] *Gebadi v Woosup (No 2)* [2017] FCA 1467 (7 December 2017) [102] (Greenwood J).
[22] Ibid.
[23] Australian Law Reform Commission, *Connection to Country*, 112.
[24] Australian Law Reform Commission, *Connection to Country*, 114, citing Law Council of Australia, *Review of the Native Title Act 1993* (Cth), (Submission: 23 January, 2015), 64.

National Congress thus submits that state-based schemes that strip our peoples of their procedural rights should not even exist - the federal *Act* must be the sole framework with regards to native title. There should be one vehicle for agreement-making in the native title context: the *Act*.

As such, National Congress is content with incumbent agreement-making mechanisms. We note that questions of flexibility and transaction costs should remain secondary to priorities such as the preservation of our cultures, the protection of our rights to determine the use of our lands and waters, and respect for our right to self-determination.

> *Recommendation B1: Consider options for allowing a PBC to enter into a contract, as opposed to an ILUA, about certain types of future act that would not require the PBC to consult with, and obtain the consent of the native title group.*

> *Recommendation B2: Consider allowing native title holders to vary the effect of section 211, which creates a protection for the exercise of traditional hunting, fishing, gathering, cultural or spiritual activities from regulation by Commonwealth, state and territory laws, through an ILUA.*

National Congress does not support recommendation B1, as it contradicts the crucial role of PBCs in managing the native title affairs for the benefit of the claim group.[25] Undermining the duty of PBCs to consult with the claim group, even in "low risk" circumstances, is incompatible with the communal and collective nature of Aboriginal and Torres Strait Islander ownership over our lands and waters. Furthermore, we stress that PBCs should not be able to enter contracts of any sort – let alone those circumventing the need to obtain the consent of the native title group – because of the serious risk that PBCs could be bankrupted, or otherwise financially hamstrung, in the event of contractual disputes, litigation, or an economic downturn. In such an event, the claim group would be left without the manager of its native title interests, defeating the entire purpose of the PBC in the first place. National Congress asserts that PBCs should operate like a trust, and that contracting with third parties should be the responsibility of a separate, PBC-like body established for each group of native title holders.

On a similar note, National Congress does not support the rationale for recommendation B2 because it rests on First Peoples reducing their rights to perform their millennia-old traditions and cultures on their own land to a bargaining chip to negotiate an ILUA. This contradicts First Peoples' commitment to their traditions and cultures.

National Congress objects to the use of ILUAs to vary the effects of section 211. For instance, a mining company negotiating with a First Peoples community may use an ILUA by which the latter surrenders their land for a new mine, especially where the community needs the land to perform cultural activities, and do the very things section 211 is designed to protect. Linked with this is National Congress's concern, to say the least, of companies negotiating ILUAs rather than Section 31 agreements, given that ILUAs can be concluded with non-native title holders, and before a native title determination is made. Hence, they can be negotiated with First Peoples who are not actually from the land on which a company may seek to establish infrastructure, and can be used to substantively erode the protections of section 211 by creating physical barriers, for example, in the form of mining infrastructure, that prevents the local peoples from hunting, fishing, or performing cultural rites, even if the ILUA does not actually refer to these rights protected by section 211 in the first place.

Question 5: Do you support the proposals set out in Attachment C to streamline existing agreement existing processes?

> *Recommendation C1: Allowing body corporate ILUAs to cover areas where native title has been extinguished.*

[25] *Gebadi v Woosup (No 2)* [2017] FCA 1467 (7 December 2017) [159], [173] (Greenwood J).

National Congress supports Recommendation C1, and notes that it will help lower the considerable delay and cost involved in native title processes by broadening the scope of the body corporate ILUAs framework. The benefits of this reform would be particularly apparent in areas where land over which native title is recognised borders that over which native title has been extinguished. Currently, if a claim group wishes to negotiate ILUAs concerning both pieces of land, they must rely on a PBC to negotiate one agreement for the land over which native title has been recognised,[26] and then negotiate another for the latter piece of land. Allowing PBCs to negotiate both agreements will alleviate transaction costs and allow greater flexibility for parties involved in negotiations. Furthermore, having PBCs negotiate ILUAs regarding land over which native title has been extinguished would promote self-determination for our peoples, given that PBCs can only presently comprise native title holders.[27]

> *Recommendation C4: Removing the requirement for PBCs to consult with NTRBs on native title decisions such as prior to entering an Indigenous Land Use Agreement in the PBC regulations.*

National Congress opposes Recommendation C4 as it undermines the role of NTRBs in the native title process. Recommendation C4 undermines First Peoples' autonomy by detracting from the central role of NTRBs, that is, to offer "support to at least some of the RNTBCs [PBCs] in their region."[28] Indeed, the recommendation is particularly bemusing as it seems to ignore the very trend which the Australian Government has celebrated, that is, that the number of determinations now exceeds the number of pending applications.[29] National Congress once again submits that if the Department wishes to alleviate the resource constraints faced by NTRBs, it should commit additional funding and capacity to NTRBs instead of seeking to bypass them entirely.

> *Recommendation C6: Amend section 24EB of the Native Title Act to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act.*

National Congress opposes Recommendation C6 due to its failure to contemplate the substantial risk of unconscionable behaviour towards Aboriginal and Torres Strait Islander peoples during negotiations for compensation not provided by an ILUA. As noted above, those responsible for negotiating compensation may be manipulated or bribed to breach their duties towards their principals. Furthermore, given that parties seeking compensation for a certain unauthorised act may already be experiencing financial or social hardship as a result of that act, they are far more likely to accept less compensation than they might be entitled to in exchange for a faster resolution.

> *Recommendation C11: Amend section 251A to clarify who must authorise an ILUA as a person or persons who may hold native title, being a person or persons who can establish a prima facie case to hold native title.*

Recommendation C11 is a common-sense amendment to correct a drafting oversight in the *Act*, and to enable those who have at least a prima facie native title claim (as per the requirements of s 223 of the *Act)* regarding particular lands or waters to have a say in decision-making concerning those lands or waters. National Congress supports this recommendation as it would ensure that traditional owners receive the benefits of decision-making autonomy, a welcome change from the status quo, in which Elders often pass away during the course of native title claims being resolved. In addition, the recommendation would allow for greater certainty surrounding the issue of which community members are required to authorise ILUAs.

[26] *Native Title Act 1993* (Cth) s 24BC.
[27] *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 4(2)(b)-(c).
[28] Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (Canberra: Deloitte Access Economics, March, 2014), 14.
[29] Attorney-General's Department, *Options Paper*, 3.

Question 6

(a) Should there be a Register of section 31 agreements?

(b) Should ILUAs – and other agreements made under the Act – be publicly accessible?

In principle, National Congress supports reform that makes agreement-making more transparent. Transparency ensures that the wishes of Aboriginal and Torres Strait Islander peoples are respected by deterring fraudulent behaviour during negotiations and allowing instances of unconscionable conduct to be identified. Furthermore, public accessibility would make it easier for our peoples to manage legal, counterparty, and regulatory risk when concluding agreements, and to protect their interests where they are affected by agreements to which they are not party. We note that as ILUAs are already publicly available through a dedicated Register, the concept of making agreements under the *Act* publicly available is not at all an alien one.

National Congress notes that there is a risk that achieving public accessibility of agreements, and the creation of a Section 31 Agreements' Register, can create significant compliance costs and requirements for all parties involved.[30] Arguably, this is of far greater consequence to Aboriginal and Torres Strait Islander communities which frequently lack the expertise and resources required to navigate complex compliance frameworks. We assert, therefore, that adequate assistance must be provided to ensure that parties have the means and knowledge necessary to comply with any transparency requirements. We note that the benefits of these requirements, such as the deterrence of fraud and a decrease in the need for litigation, easily covers the costs of such assistance.

Question 7: Should the Act and the PBC Regulations be amended to allow native title claim groups and native title holders to determine their decision-making processes, rather than mandating the use of traditional decision-making where such a traditional process exists?

National Congress is sceptical of this recommendation, despite it appearing at a surface level to enhance Aboriginal and Torres Strait Islander peoples' autonomy. We assert that allowing claim groups and native title holders to determine their own decision-making processes has the potential to undermine the integrity of our cultures and communities.

The ALRC has noted that traditional decision-making can be problematic in the native title context due to significant time and resource requirements.[31] National Congress notes that difficulties such as remoteness and cultural obligations can be overcome by facilitating online meetings, providing transport, scheduling gatherings around weather conditions (e.g. dry season) and cultural events, and so forth. These material difficulties are easily remedied and should not be used as an excuse to overrule the need to uphold Aboriginal and Torres Strait Islander cultures.

Similarly, National Congress notes that the criticism[32] of traditional decision-making processes as alienating younger members of First Peoples communities, who may prefer a more participatory process over one concentrating power in Elders. We stress, however, that this disenchantment is often the result of a broader loss of connection with our cultures, inflicted by intergenerational trauma and assimilatory government policies. Allowing traditional decision-making processes to be supplanted would be tantamount to severing one of the few remaining cultural ties which our young people possess with their heritage.

[30] Australian Law Reform Commission, *Connection to Country*, 307, citing AIATSIS, *Submission to Australian Law Reform Commission Review of the Native Title Act Discussion Paper 82 (DP 82)* (Acton: 18 February, 2015); at 307, citing National Native Title Tribunal, *Submission to the Australian Law Reform Commission Discussion Paper, Review of the Native Title Act 1993* (Perth: 21 January, 2015); at 307, citing Angus Firth and Maureen Tehan, *Submission* (19 January, 2015).

[31] Australian Law Reform Commission, *Connection to Country*, 301, citing Department of Justice, Victoria, *Preliminary Submission by the Department of Justice, Victoria to the Australian Law Reform Commission Inquiry: Review of the Native Title Act 1993* (Melbourne: 2013).

[32] Attorney-General's Department, *Options Paper*, 17; Australian Law Reform Commission, *Connection to Country*, 301, citing *Butchulla People v Queensland* (2006) 154 FCR 233, 242 [30] (Kiefel J).

Engagement with First Peoples youth must be mediated through traditional decision-making processes as it both enables their involvement in matters of significance for their community and contributes to their bond with their cultures. By participating holistically in the cultural life of their communities, and not merely picking and choosing the aspects of it which they find attractive, our young people are far more likely to develop an appreciation and respect for our cultures and histories.

As such, National Congress asserts that the proposed amendments would not "support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties."[33] Indeed, we note that they may accomplish the opposite: instead of empowering Aboriginal and Torres Strait Islander communities, they may serve to dismantle a central part of our cultural and community life.[34]

CLAIM RESOLUTION AND PROCESS

Question 8: Do you support the proposed amendments detailed in Attachment E to improve the efficiency and effectiveness of claims resolution?

> *Recommendation E1: Section 138B(2)(b) of the Native Title Act, which provides that the Federal Court may only direct that a native title application inquiry be held if the applicant agrees to participate, should be repealed.*

National Congress notes that the positive aspects of Recommendation E1, such as reduced time and resource requirements, are vastly outweighed by the fundamental problems which it would create. Firstly, the recommendation contradicts the voluntary nature of native title adjudication,[35] and undermines the role of applicants as parties to an inquiry, as per s 141(5) of the *Act.* Furthermore, the repeal of s 138B(2)(b) would make it easier for the FCA to order an application inquiry by side-stepping the requirement of the applicant's consent. Members of the applicant would be obliged to assist this inquiry, even where they do not have the resources, expertise, or preparation time required to do so. Ignoring the applicant's lack of consent can also be culturally insensitive, particularly if members are required to forego their cultural obligations, or to reveal details of secret or sacred traditional practices. Indeed, attending inquiries may be physically challenging, particularly for those living in remote communities who must deal with difficult weather conditions and inconvenient geography. As such, National Congress submits that the current underutilisation[36] of application inquiries is at least preferable in that applicants are not compelled to participate, and the voluntary nature of the native title system[37] is respected.

> *Recommendation E2: Section 156(7) of the Native Title Act, which provides that the National Native Title Tribunal's power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed.*

As with recommendation E1, National Congress notes that any efficiency gains provided by Recommendation E2 would be vastly outweighed by the problems it would generate. For instance, broadening the scope of the National Native Title Tribunal's coercive power would undermine efforts to make the native title system more accessible by breeding disenchantment and frustration with the resolution process. We fear that this frustration may in turn lead Aboriginal and Torres Strait Islander peoples to look outside the *Act* and its system of substantive and procedural protections for First Peoples to attempt to benefit from traditional lands and waters, increasing the risk of manipulation or exploitation. Furthermore, we note that, as above, the recommendation would undermine the voluntary nature of the native title regime, and compel individuals, regardless of their ability and preparation, to participate.

[33] Australian Law Reform Commission, *Connection to Country*, 23.
[34] Ibid 301, citing Law Society of Western Australia, *Australian Law Reform Commission Issues Paper 45: Review of the Native Title Act 1993* (Submission, Perth: 14 May, 2014).
[35] *Native Title Act 1993* (Cth) Preamble.
[36] Ibid 381, quoting Law Society of Western Australia, *Issues Paper*.
[37] *Native Title Act 1993* (Cth) Preamble.

Recommendation E6: Introduce a new section into the Act allowing for historical extinguishment over areas of national, state or territory parks to be disregarded, where the parties agree, for the purposes of making a native title determination.

National Congress supports Recommendation E6 because it promotes the recognition of First Peoples' status as traditional owners under the *Act*. Recommendation E6 correctly recognises the fact that many national, state or territory parks are of cultural significance to First Peoples. Negotiation has been successful in managing various issues in national, state or territory parks.

Clarifying who must agree to consent determinations over part of a claim

Subject to details, National Congress may well support an amendment to the *Act* that would clarify who must agree to consent determinations, but stresses that the present role of claimants, represented through the applicant, must not be undermined. We submit that the *Act* should mandate that when it comes to negotiating the agreement on which the consent determination is based, all living members of the applicant must agree with the agreement, or indeed the following of the consent determination process itself.

Clarifying who must agree to consent determinations over part of a claim would further improve a process that has been the driving force behind the recent rise in the rate of native title determinations.[38] Firstly, the proposed reform would make consent determinations more attractive by improving transparency and thus helping parties to plan their actions in order to secure a consent determination. This would also benefit parties who have little chance of success at a hearing in being able to [39]negotiate a compromise, delivering at least some meaningful benefit to their peoples. Furthermore, the proposal would mitigate more general concerns regarding the transparency of consent determination policies and the approaches of parties, particularly state and territory governments, towards negotiation with claim groups.[40]

National Congress further submits that any reform seeking to clarify who must agree to consent determinations must be clear on what the FCA would consider "appropriate" under ss 87-87A of the *Act*. Offering a concrete stipulation of what would be deemed "appropriate" would ensure that parties have access to appropriate legal advice,[41] and a holistic understanding of what is expected from them.

National Congress stresses, however, that any amendment to the consent determinations framework must ensure that native title holders are not driven to a decision less valuable than that of actual native title litigation. Failing to do so would allow consent determinations to become yet another way for First Peoples to be short changed by government and commercial opportunism. There is little meaning to a consent determination if Aboriginal and Torres Strait Islander peoples remain at the mercy of governments and business entities, and if we are forced to give up significant rights normally gained from a native title determination.[42]

POST-DETERMINATION DISPUTE MANAGEMENT

Question 9: Do you support the proposed amendments in Attachment F to address post-determination native title related disputation?

Recommendation F1: It is recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC

[38] Senior Officers Working Group, *Investigation*, 25.
[39] Ibid.
[40] Australian Law Reform Commission, *Connection to Country*, 364.
[41] Tony McAvoy, "Native title litigation reform," *Reform*, no 93 [2009], 31.
[42] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth): Final Report* (Sydney: Australian Government, April 2015), 101, AIATSIS, *AIATSIS Submission to Australian Law Reform Commission Review of the Native Title Act Issues Paper 45 of March 2014*, (Acton: 14 July, 2014).

Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members.

National Congress asserts that expanding the Registrar's powers in this fashion is an inappropriate means of expanding regulatory oversight of PBCs. Although we agree that PBCs require further regulatory oversight in order to adapt their institutional infrastructure to support the use of native title rights as part of the mainstream economy[43] and to facilitate capacity building through ensuring resolute corporate governance, the Registrar's continued failure to meet the goals and expectations set for it by Aboriginal and Torres Strait Islander peoples renders it an inappropriate body to provide this oversight.

There is merit in the Department considering alternatives, such as allowing the Australian Securities and Investments Commission to take over from the Registrar in respect of all First Peoples companies, including those not registered under the *CATSI Act*.[44] Indeed, National Congress considers the regulation of several Aboriginal and Torres Strait Islander corporations by the Registrar, and not the country's foremost corporate regulator, to be another example of discriminatory treatment of our peoples. We submit that the Australian Government should increase ASIC's funding to allow it to build cultural competency to properly regulate our corporations. Having the premier corporate regulator preside over Indigenous corporations is not an alien concept. For instance, in the United States, the federal securities regulator, the Securities and Exchange Commission regulates Native American companies.

Recommendation F2: It is recommended that the CATSI Act be amended to provide a power for the Registrar to refuse to amend a PBC's rule book in circumstances where the amendment would result in the PBC no longer meeting the requirements of regulation 4(2) of the PBC Regulations.

Recommendation F3: Introduce a requirement that the dispute resolution provision in the PBC rulebook specifically addresses arrangements for resolving disputes about membership (clarifying that such disputes can arise between members and directors, between native title holders, and between native title holders and the PBCs and its members and directors).

Recommendation F5: Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour. Require the process for cancellation of membership to include a general meeting

National Congress supports recommendations F2-3 and 5, since they promote the autonomy of native title holders in relation to the management of native title rights. They ensure that the membership of the PBC formed to manage their rights is made of only them, or the people they authorise, which is critical to the meaningful exercise of native title rights.[45] Furthermore, the proposed amendments would be a safeguard, especially against the abuse of PBCs' directors of their discretion over membership,[46] which can be manifest in arbitrary amendments to the PBC's Rule Book that alienate some common law holders. The enactment of recommendation F2 is a matter of common sense – having PBC membership being comprised of people whose native titles are actually managed by the PBC is critical to the function of PBCs.

Similarly, recommendation F5 is essential for upholding the integrity of the membership process in ensuring that membership is not revoked, or a PBCs' Register of Members is not amended, on arbitrary, purely subjective, grounds. Membership should especially be restricted to people meeting the criteria of the *Native Title (Prescribed Body Corporate) Regulations 1999 (Cth)* r 4(2), given that PBCs represent the interests of native title holders. In addition, National Congress submits that membership should be restricted to people who have not engaged in violent and/or otherwise disruptive behaviour in relation to the PBC's business.

[43] Senior Officers Working Group, *Investigation*, 59.
[44] *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
[45] Ibid.
[46] Ibid.

The disruption of PBC meetings due to violent or unruly behaviour by members undermines the governance of PBCs, and as such we support the implementation of recommendation F5 as a means of preventing arbitrary expulsions while allowing for the removal of people who should not be members due to ineligibility or misbehaviour.

Another reason for our support of Recommendation F5 is its mandating that PBCs hold a general meeting to revoke membership in the case of ineligibility or misbehaviour and that the Register can only be amended as per the relevant PBC's Rule Book. Furthermore, the requirement for a general meeting would help preserve the consensus-based form of decision-making, which National Congress champions.

National Congress asserts that Recommendation F3 would mitigate the delay involved in resolving membership disputes that can distract PBCs from their role as representatives of native title holders. Furthermore, recommendation F3's mentioning of disputes between non-members and the PBC is particularly welcomed, given that it creates an avenue for First Peoples who have been denied membership to a PBC to challenge that denial. Dispute resolution would thus no longer be confined to the PBC's internal functioning. This increases the procedural fairness accorded to them.

National Congress' support for recommendations F2-3 and 5 is also driven by our strong displeasure at the exclusion of our peoples from any form of decision-making concerning their interests. In fact, we note that common law holders should automatically qualify as members of an RNTBC acting as trustee or agent in respect of their native title. This should help lower the transaction costs of RNTBCs having to consult with two sets of common law holders in relation to the same parcel of land: one comprising members of the RNTBC, the other not so, even though membership of RNTBCs must be open to all common law holders.[47] Furthermore, National Congress considers that an additional safeguard would be to give the Registrar power to amend the PBC's Register of Members to either include, or remove, members if it is just, and equitable to do so.[48]

> *Recommendation F6: It is recommended that the CATSI Act be amended to empower the Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure that rule books are complied with in relation to the revocation of membership of individuals.*

National Congress does not support Recommendation F6, primarily because we consider this as setting a dangerous precedent for regulatory intrusion on the Registrar's part into the operation of Aboriginal and Torres Strait Islander PBCs. Instead of such an undesirable outcome, National Congress calls for a self-regulatory mechanism for PBCs built on annual (to start with) self-reporting to the Registrar by PBCs as to their compliance with Rule Books and the revocation of membership. The products of this reporting should also be distributed amongst members, and the relevant native title holders (who would be entitled to be members anyway),[49] as a deterrent against fraudulent/arbitrary removal of members, and a means of strengthening PBC governance through greater transparency of PBC processes.

[47] Office of the Registrar of Indigenous Corporations, *Technical Review of the Corporations (Aboriginal And Torres Strait Islander) Act 2006 Discussion Paper: Questions and Themes* (Canberra: Australian Government, 5 July, 2017), 8.
[48] Ibid 11.
[49] *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) reg 4(2)(c)(i).

Recommendation F7: It is recommended that the CATSI Act be amended to require PBCs to set up and maintain:

1. *a 'Register of Native Title Decisions'; an*
2. *a 'Register of Trust Money Directions'.*

It is recommended that the CATSI Act be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations.
It is recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by:

1. *members;*
2. *common law holders.*

It is recommended that PBCs be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the PBC Regulations) in the relevant decision.
It is recommended that the Registrar should have the same powers in relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members).

Recommendation F9: Introduce a requirement that the common law holders be consulted on the investment and application of native title monies so that the obligation to seek direction from the common law holders is met (whether or not the monies are held by the PBC).

National Congress submits that both recommendations will improve PBC transparency to a great extent, enhancing their accountability, and their governance. This, in turn, will build their ability to manage the interests of the common law holders, as well as their members.[50]

National Congress suggests that the creation of the two Registers and the requirement of the Native Title Decisions Register to include evidence of requisite consultation and consent to be foundational for greater PBC accountability and transparency. We largely support the mode recommended in which the Registers would be available for inspection to ensure that their creation is not merely tokenistic, and that PBCs' conduct can be checked. Congress believes this is quite likely to deter PBCs' making decisions that may, for instance, alienate certain common law holders/members (complementing recommendations F2, 6), or be in breach of their duties.

Both recommendations would likely mitigate PBC fraud risk in relation to trust money, complementing Recommendation F1. National Congress envisions there to be little disruption to PBCs' operations, and a very small additional compliance burden for them in having to create and provide access to Registers. This is because well-managed PBCs would already have strict processes in place to record their decision-making and the handling of native title monies. We reiterate that ASIC should be the agency tasked with overseeing the activity of PBCs, not least since it has considerable experience in monitoring periodic reporting from corporations generally (their annual, and financial, reports) as required by the *Corporations Act 2001 (Cth)*.

Enacting Recommendation F9 would build on Recommendation F7 since it would not only mitigate the significant regulatory gap of the PBC Regulations not applying to trust monies being held outside the PBC,[51] but also respect the autonomy of native title holders in their decision-making on spending of benefits from native title. National Congress highlights that this is in line with the 'broad agreement that decisions about how land- related benefits are used should be made by Indigenous groups.'[52] We further stress that Recommendation F9 would reinforce the role of PBCs as acting for the benefit of the native title holders.

[50] Senior Officers Working Group, *Investigation*, 59.
[51] Ibid.
[52] Ibid 68.

National Congress notes that some concerns may be raised regarding the detrimental effect of increased compliance burdens upon PBCs. However, we stress that such concerns are greatly overstated. Firstly, it is quite arguable that soundly-managed PBCs would record their native title decisions in any case, and thus it is a reasonable extension for PBCs to record them in a register accessible to a select audience. This should apply to their handling of trust monies - the Register of Trust Money Decisions can be populated from the PBC's accounting records. Secondly, National Congress stresses that stakeholders have identified transparency as a factor influencing PBC capability, and accountability.[53] Finally, the benefits of stronger governance of PBCs outweigh the cost of putting in place sound controls to achieve that governance (for instance, significant savings in lower risk of fraudulent handling of trust monies, and having to litigate for their recovery).

The only component of Recommendation F7 which Congress disagrees with is the requirement for PBCs to provide an extract of either the suggested new Registers to any person having a 'substantial interest' in the relevant decision. We consider that such information should not be provided to non-members, or persons who are not native title holders, even if they have a 'substantial interest' within the meaning of the Regulations. The provision of information to such individuals arguably constitutes considerable intrusion into the affairs of Aboriginal and Torres Strait Islander peoples. Extracts from the Registers should only be available to members/native title holders who actively participate in their communities. It should not be available to non-Indigenous, or even First Peoples who are not from the relevant land, but on the fringes of the relevant community at best. National Congress fears that broadening the availability of extracts could allow individuals to access information for no reason other than their own ulterior motives, such as scoping out the governance agreements of a community of which they are not active members.

National Congress recognises that our position could be detrimental to persons who may have a 'substantial interest' in a relevant decision by the PBC; for instance, through contracting with them to provide the PBC services. This can be remedied, however, by such persons requesting this information from members of the PBC or native title holders, and that these requests be recorded in a third Register. This ensures that the latter entities, and by proxy, the relevant community, are aware of who is accessing this (arguably sensitive) information concerning the PBC's decision-making. In turn, they can identify entities that are potentially interested in PBCs' affairs, and precursors of possible external interference, which can undermine PBCs', and their communities', governance.

CONCLUSION

The *Act* regulates an area of policy central to Aboriginal and Torres Strait Islander peoples' lives: our connection to country, and the formal recognition of that connection. Our lands and waters are central to our social, cultural and spiritual wellbeing. They are intrinsically tied to the survival of our cultures and histories in the face of adversity. They allow for the continuation of the traditional practices which link past, present and future generations. Perhaps most importantly, our ability to determine how they are used is central not only to our economic empowerment, but also our self-determination.

There remains significant progress to be made. Our communities still do not have the final say over activities such as mining and exploration. In the context of economic development, our ability to benefit from our traditional lands and waters has been obstructed by both the onerous requirements of proving native title and a "bundle of rights" approach that frequently does not confer exclusive possession. Even the basic aspiration of many Aboriginal and Torres Strait Islander peoples – to have our sovereignty over our land formally recognised – is frequently hampered by lengthy procedural and administrative delays.[54]

Native title is not the complete solution to the many disadvantages which Aboriginal and Torres Strait Islander peoples continue to face today.[55] Allowing First Peoples, however, genuine decision-making power

[53] Senior Officers Working Group, *Investigation*, 59.
[54] Neva Collings, "Native title, economic development and the environment," *Reform*, no 93 [2009], 46-7; Tom Calma, "Native Title in Australia," *Reform*, no 93 [2009], 6.
[55] Tom Calma, "Native Title in Australia," 8; *Native Title Act 1993* (Cth) Preamble.

over the fate of their lands and waters is a key step towards achieving self-determination and consequent well-being. National Congress reiterates that any reforms made to the *Act* must be guided by the principles outlined by the *UNDRIP*, Aboriginal and Torres Strait Islander organisations, and the Uluru and Redfern Statements -- Australia's First Peoples have the solutions to the difficulties we face, and must receive genuine support and engagement from federal, state and territory governments if we are to succeed.