Statement to the

Senate Legal and Constitutional Affairs Legislation Committee

on the

Inquiry into the Native Title Amendment (Reform) Bill 2011

NATIONAL CONGRESS
OF AUSTRALIAS FIRST PEOPLES

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STATEMENT

by

National Congress of Australia's First Peoples

to

Senate Legal and Constitutional Affairs Legislation Committee
Inquiry into the Native Title Amendment (Reform) Bill 2011 ("the Bill")

Introduction

1. The National Congress of Australia's First Peoples (Congress) has been established to be a national leader and advocate for Aboriginal and Torres Strait Islander peoples.

2. We are grateful to the Senate Legal and Constitutional Affairs Legislation Committee ("the Committee") for receiving this late written submission with respect to this important Bill.

Summary

3. A summary of Congress's position with respect to the Bill can be stated as follows:

Item	Proposed Amendment	Position
1	Insert 3A(1) affecting implementation of principles contained in United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")	**Supported**
	Insert 3A(2) interpretation and application of NTA consistent with UNDRIP	**Supported**
	Insert 3A(3) principles in 3A(1) to be applied by persons performing functions under NTA	**Supported**
2	Delete existing 24MB(1)(c), insert new 24MB(1)(c) creating requirement for *effective* cultural heritage protection	**Supported**
3	Delete existing 24MD(2)(c) and insert new 24MD(2)(bb) and (c) extending the non-extinguishment principle to compulsory acquisition of native title until underlying purpose of acquisition achieved	**Supported**
4	Delete existing 26(3) to remove excising of offshore areas from the operation of s26	**Supported**
5-9	Delete existing 31(1)(b) insert new 31(1)(b), 1A and 2A. Amend existing 35(1) to make it subject to new s35(1A), insert new 35(1A)	**Supported**
10	Delete existing 38(2) and insert new 38(2)	**Supported**

11	Insert new 47C to allow agreement between applicant and Government to disregard certain extinguishing acts	**Supported**
12	Insert new 61AA and BB to create presumption of continuity	**Strongly supported, subject to minor qualification**
13-14	Insert new 223(1A),(1B)(1C) and (1D), delete existing 223(2) and insert new 223(2)	**Supported**

Item 1

4. The principle underpinning the amendment to the *Native Title Act 1993* (Cth) ("**NTA**") to make reference to and seek consistency with the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") is supported.

Amendment to insert new ss 3A(1)-(3)
5. Congress supports the amendment to insert into the objects of the NTA a requirement to have regard to certain principles extracted from the UNDRIP.

6. The implementation of the UNDRIP into Australian domestic legislation is a matter of high priority for Congress. It is disappointing that the Australian Government has not taken any steps towards domestic application of the UNDRIP. It is clear that the NTA is legislation which would benefit from a comprehensive review designed at achieving implementation of the rights set out in the UNDRIP. 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.

7. The proposed new s 3A(1) provides a platform for the scrutiny and analysis of the issues of the type referred to above. It does not import the provisions of the UNDRIP into the NTA but merely directs the Government to proceed with implementation of the articulated rights within the NTA.

8 Congress supports the proposed amendment to insert a new s 3A(2). This provision has the effect of ensuring that the provisions of the NTA are applied and interpreted in a manner consistent with the UNDRIP. The amendment, on Congress's advice, does not permit the interpretation or application of the provisions of the NTA in manner inconsistent with clear expressions of parliamentary intent. It is understood that there is some concern from the Committee in relation to the potential for the Item 1 amendments to import a right of veto in respect of development. It is submitted that such an outcome would be inconsistent with principles of statutory interpretation. The absence of a right of veto in the NTA is expressed in unambiguous terms.

9. Congress also supports the insertion of a new provision at s 3A(3). The effect of the provision is to direct the every person exercising a power of function under the NTA to apply the principles set out at s 3A(1) when exercising such power or function. The operation of the provision is limited to "relevant cases". The native title system is a creature of statute. All powers and functions are sourced in the NTA. The

persons exercising such powers and functions would include the Court, the National Native Title Tribunal, the Native Title Registrar, the Minister, the native title service providers and the native title applicants. The use of the term "relevant cases" must be understood to mean those circumstances in which the power or function being exercised permits a construction of the provision granting such power or function which is consistent with the application of those principles.

An alternative mechanism to import the UNDRIP

10. An alternative raft of provisions giving some effect to the intention to give recognition to the principles contained in the UNDRIP which could both stand alone, or operate as a pre-cursor to more substantive review of the NTA is as follows:

> *Recommended amendment to Preamble to NTA*
>
> Insert after the words "Universal Declaration of Human Rights" the words "and the United Nations Declaration on the Rights of Indigenous Peoples"
> Recommended Alternative New s 3A(1)
>
> *Recommended amendment to s 3 NTA*
>
> Insert new s 3(e):
> "Section 3(e) to provide for the recognition of and protection of relevant Aboriginal Peoples and Torres Strait Islanders rights, including those recognised in international instruments."
>
> *Recommended amendment to insert new s 7A NTA*
>
> Insert new s 7A:
> "Section 7A Relevant **International Instruments**
> (1) This Act is intended to be read and construed subject to the relevant provisions of the relevant International Instruments.
> (2) Subsection (1) means only that to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the relevant International Instruments if that construction would remove the ambiguity.
> (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act."
>
> *Recommended amendment to s 253 NTA*
>
> Insert amendment to s 253:
> "**relevant International Instrument**" means all international treaties, conventions and declarations entered into by Australia which provide for the recognition and protection of human rights, including Indigenous Peoples rights, such as, but not limited to, the Universal Declaration of Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples, the International Covenant on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic Social and Cultural Rights, the International Covenant on Civil and Political Rights, the United Nations Convention on Biological Diversity such as they may be applied to the recognition of native title rights and interests under this Act."

11. The above alternative would ensure that the spirit of the UNDRIP was imported into the NTA without the need for resolution of the clear inconsistencies, such as a right of veto in relation to compulsory acquisition or development. To the extent that

there is concern about the UNDRIP being used to over-ride the principles or themes in the NTA, it is submitted that this is simply not possible unless there is a clear statement of intent in the NTA to the effect that in the case of inconsistency the NTA must give way to the UNDRIP. There is no such clause being promoted for insertion into the NTA. If the provisions set out above were inserted into the NTA, the UNDRIP could only be called upon in cases of uncertainty or ambiguity.

Item 2

12. The amendments proposed at Item 2 are supported. The amendments are considered necessary and appropriate. While there may be some criticism of the introduction of the notion of "effectiveness" to the circumstances in which non-legislative acts which pass the freehold test will be afforded validity, fundamental shifts in cultural heritage protection legislation in the various State jurisdictions has given rise to valid and proper concern.

13. 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. In New South Wales for instance, the duty of care obligations will have been satisfied by a proponent who carries out a search of the government operated sites register.[1] In an environment where it is known by government that Aboriginal people are protective of the information they hold about site location, the provision of a defence based solely upon a search of a site register may not fit the description of "effective" protection.

14. It is submitted that there is a very real purpose to ensuring that the cultural heritage protection mechanisms being relied upon in relation to such future acts are effective. The submissions to the Committee of the Yamatji Marlpa Aboriginal[2] Corporation on this point are relevant and are supported by Congress.

Item 3

15. The amendments proposed at Item 3 seek to extend the non-extinguishment principle to compulsory acquisitions of native title rights and interests where the underlying purpose has not been carried out. Item 3 is supported in principle.

16. The principle underpinning the proposed amendment is directed towards a practical issue in that native title rights and interests may be acquired and therefore extinguished for a valid purpose, but many years may elapse post acquisition without performance of the purpose. In those circumstances, the native title rights ought to be able to be revived. However, the method proposed in the Bill is problematic. Native title rights and interests can only be held by Aboriginal People and Torres Strait Islanders who have acquired those rights in accordance with traditional law and custom. The government may only acquire the rights in the sense that they are extinguished. It is for this reason that the non-extinguishment principle is necessary to allow, for instance, public infrastructure to be constructed and used without acquiring native title but merely impairing it.

[1] Sections 87(2) and 90Q National Parks and Wildlife Act 1974 (NSW)
[2] Yamatji Malrpa Aboriginal Corporation submission 8

17. It is submitted that the mischief sought to be remedied by the proposed amendment may be more appropriately achieved by introduction of a further mechanism for disregarding extinguishment which would sit in Division 4 of the NTA together with s47, 47A and 47B. The provision should enable the extinguishing effect of any compulsory acquisition of native title to be disregarded in circumstances where the underlying purpose has not been performed. It should not be contingent upon demonstration of occupation at the time the application was made.

Item 4

18. The proposed amendment to s 26 of the NTA has at its foundation an important matter of principle and fact. Aboriginal People and Torres Strait Islanders have equal regard, connection, ownership, uses and responsibilities for their sea country as they do their lands.[3] It is doubted that many people would find this statement controversial, yet the present form of s 26 creates an anomaly whereby the procedural rights attached to the lands are not attached to the sea country.

19. It is noted that the Queensland Government submission[4] is critical of this item on the basis that it will only apply to the right to negotiate in respect of offshore mining. It is submitted that even if it were the case that this is all it achieved, the amendment would warrant enactment. However, the view of Congress, on advice, is that it would also apply to compulsory acquisition of native title rights and interests in offshore places. The amendment is supported.

Items 5 to 9

20. The amendments contained at Items 5-9 of the Bill are directed towards remedying the inequities in the existing provisions which were exposed by the decision in *FMG Pilbara Pty Ltd v Cox (2009) 175 FCR 141*. In that case the mining company FMG relied upon a statutory time limit notwithstanding the parties were in 'active' negotiation. The question arose as to whether FMG had acted in good faith. The Full Federal Court held on appeal that FMG was entitled to rely upon the statutory time limits.

21. The proposed amendments to ss 31 and 35 of the NTA ought properly be described as refinements to previous attempts to strike an appropriate balance between demands from industry for certainty of process and effective and meaningful native title procedural rights.

22. The amendments as drafted bring into legislative form much of what might be described as standard practice in the right to negotiate process. The only element which may be regarded as particularly controversial is the exclusion allowed to mining companies in relation to sensitive or commercially confidential information. In this regard Congress supports the submissions of the North Queensland Land Council and the Kimberley Land Council. Access to all relevant information regarding the mining project ought to be considered essential to ensuring that due diligence inquiries have been performed prior to entering into any such agreement. Otherwise, the amendments should be largely uncontroversial and are supported by Congress.

Item 10

[3] See also the submissions of the Torres Strait Regional Authority – submission 11
[4] Submission 27A to the Inquiry

23. The intended effect of the proposed amendment to s 38 is twofold. First, to make clear that it is open to the arbitral body to include the requirement of the payment of royalties when determining the conditions under which a future act may be validated. The second intended effect must be that the existence of the explicit power of the arbitral body to make such conditions will give greater power to the native title parties seeking such outcomes from mining negotiations.

24. While agreement with mining companies that include royalty or production payments cannot be said to be standard practice, it is a regular occurrence that should be elevated to standard practice. Congress supports the proposed amendments.

Item 11

25. This item of the Bill proposes that a new provision be inserted into Division 4 of the NTA to allow for an agreement between the Government party and the applicant in the proceedings to disregard prior extinguishment in relation to an area the subject of the proceedings.

26. The provision provides greater flexibility to the native title applicant and the Government party in coming to agreements which meet the needs of both parties. The amendment would give the Government party more options as to how it offsets its compensation liabilities while allowing applicants to obtain recognition of a broader range of lands than is presently available.

27. There is a need for a further amendment to the proposed amendment to include the word "relevant" before the words "Government party". "Government party" is defined at s 253 by reference to s 26(1). However, s 26(1) is clearly concerned with future acts and while some of the extinguishing acts sought to be disregarded by agreement will be future acts, most will not.

28. Congress supports this item.

Item 12

29. The proposal to insert new sections at s 61AA and s 61AB is presumably the most pressing goal of the Bill. The need for an easing of the burden of proof in relation to continuity of connection has been raised on numerous occasions. Perhaps the most significant comment was that of the Chief Justice of the High Court of Australia, His Honour Justice Robert French when he wrote, extra-curially, in the Australian Law Reform Commission journal "*Reform*" that such a reform was "modest". The submissions of the National Native Title Council are considered to be very persuasive on this point.[5]

30. The introduction of a presumption of continuity has been the subject of considerable discussion and debate since the Chief Justice's comment. The most forceful arguments against an effective reversal of the onus of proof with respect to the issue of continuity seems to be that the Federal Court, being the court dealing with issues of fact, and the parties have made significant investment in the present process of proof.

[5] National Native Title Council submissions – submission 14

31. In response to such submissions, it is submitted that the present processes often rely upon the extension of leniency or flexibility in interpretation of the law by the Government parties and therefore does not promote equality of bargaining power.

32. Comparatively speaking, very few native title cases are determined following a contested hearing. Most are settled when the relevant Government party satisfies itself that there is sufficient credible evidence to support each of the required factual matters. Equality of bargaining power is central to an agreement-making process designed to deliver land justice.

33. The case for such an amendment is submitted to be much stronger in that:

- *The parties and Court will easily adapt to the new process;*

The parties in particular will have little difficulty in adjusting the present processes to accommodate the proposed amendments. Having established the requisite evidential connection between the pre-sovereignty society and the claim group, the Government party will then need to either produce evidence that will rebut the presumption or move on to the next phase of negotiation.

- *The underlying unfairness in the present process will be ameliorated;*

The thrust of Chief Justice French's paper in *Reform* was that the burden of proof upon native title applicants was too high. To require applicants to prove the continuity of a society, and laws acknowledged and customs observed over successive generations is a burden that is not only onerous, but excessively so. It is not encountered in any other jurisdiction. Indeed, the law has long understood the prejudice suffered by a party when it is called upon to answer claims in which there has been delay. In each Australian jurisdiction there exists a form of legislation which provides limitations on the time in which proceedings may be brought after the relevant event has occurred. Yet a system has been created through the NTA where Aboriginal People and Torres Strait Islanders are required to positively prove historical matters when most of the historical documents are held by the State Governments. The delay in this case is not that of the Aboriginal People and the Torres Strait Islanders but the delay of the State in not providing a system for determining claims of traditional ownership.

- *The cost of proof of continuity;*

Congress is advised that significant savings could be made in the cost of research, analysis and expert opinions and reports on documentary evidence which in most cases covers several generations. This expense adds to the cost of the whole native title system.

It is likely that the evidence filed on behalf of the applicant from members of the claim group attesting to the receipt of knowledge in accordance with traditional law and custom will not differ. To this extent the cost of preparation of lay evidence will not be reduced to any great extent, if at all.

34. The item is not without some minor difficulties. The drafting of s 61AA and s 61AB in the Bill has the likelihood of creating multiple tests for certain aspects of the presumption. The sections may be easily remedied by re-drafting in the following fashion:

S 61 AA (1)(c) insert after the words "the members of the native title claim group, by the" the word "asserted".

Or, alternatively

Deleting the existing s 61 AA (1)(c) and deleting from s 61 AA (1) the word "an" where it appears before the word "application" and inserting in lieu thereof the words "a registered"

35. The above amendment would avoid interpretation of the provision by the parties and the Court in a manner that inadvertently required proof of the traditional laws and customs in order to gain access to the presumption[6].

S 61 AB(1) delete the words ", or a finding to that effect, may be set aside only" and insert in lieu thereof the words "may only be rebutted" .

36. The effect of the above amendment will be to bring the language of the section into line with the language normally used in relation to the application of and challenge to rebuttable statutory presumptions.

Items 13 and 14

37. The amendments to s 223 of the NTA proposed in Items 13 and 14 are supported.

Amendment to s 223 to insert new ss 1A and ss 1B
38. The amendment of s 223, about which there has been significant judicial consideration, is on its face potentially problematic. However, closer examination of the proposed amendments to insert new ss 1A and ss 1B discloses that the provisions

- make clear in legislation the approach taken by the Courts that traditional laws and customs are capable of adaption without severing the connection to the laws and customs in existence at time of assertion of British sovereignty; and

- ensure that in the process of adaption, those laws and customs must only remain identifiable.

Amendments to s 223 to insert a new ss 1C
39. The proposed amendment is supported and it is noted that it should be uncontroversial as it reflects the approach taken by the Courts.

Amendment to s 223 to insert a new ss 1D
40. This amendment is supported although it marks a slight change from the approach currently taken by the Courts and the parties. The Courts and parties presently take the view that the relevant test for continuity of connection does require proof of continuous acknowledgement and observance of traditional laws and customs, but in undertaking the necessary factual examination are prepared to readily apply inferences to overcome gaps in the evidence. While the proposed s 223

[6] Noting the North Queensland Land Council submission – submission 1, p 2

(1D) goes further and makes proof of strict continuity unnecessary, the section is consistent with the proposed amendments to introduce a presumption of continuity and will not make any significant change in practice.

Amendment to s 223 to delete the existing ss 2 and insert a new ss 2
41. The amendment is supported. The effect of the proposed amendment is to make clear that the parliament contemplates that native title rights and interests will include the "*right to trade and other interest of a commercial nature*". The leading case on the point is the decision in *Commonwealth of Australia v Yarmirr (2001) 208 CLR 1*("the Croker Island case") in which the High Court of Australia held that while it might be possible to find the existence of native title rights to engage in commercial activity the facts in that case did not establish such a right. The effect of the decision was to make difficult, but not impossible, the recognition of any right to trade.

42. The decision in the Croker Island case is one which unambiguously positions the native title process as one created and managed from a colonial, or post-colonial perspective.

43. While not strictly necessary, the proposed amendment is desirable and supported.

Closing Comments

44. Congress has as its mandate the recognition and promotion of the rights and interests of Aboriginal People and Torres Strait Islanders. The UNDRIP is obviously a statement of principle and rights about which comprehensive and detailed dialogue and negotiation can be structured.

45. The Native Title Act 1993 must be the subject of root and branch review to endeavour to achieve consistency between it and the UNDRIP. The Australian Parliament and the Commonwealth Government are urged to undertake such a review as soon as possible.

45. However, the need for more detailed review of the NTA does not detract from the importance and timeliness of the amendments contained in the Native Title Amendment (Reform) Bill 2011.