NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES LTD
ABN: 47 143 207 587

Statement to

Senate Legal and Constitutional Affairs Committee
Standing Committee on Aboriginal and Torres Strait Islander Affairs
Parliamentary Joint Committee on Human Rights

Native Title Amendment Bill 2012 and future reform of the native title process

February 2013

NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES

Introduction

1. The National Congress of Australia's First Peoples (Congress) acknowledges and pays respect to our spiritual ancestors, our Elders and the Aboriginal and Torres Strait Islander peoples as the original and rightful owners of the lands, territories and resources.

2. Congress is the national representative body for Aboriginal and Torres Strait Islander peoples. Congress has the purpose to ensure the rights of the First Peoples are promoted and protected, and to find solutions to the injustices, disadvantages and impediments that continue to obstruct the development of our peoples.

3. Congress provides this statement to the Senate Legal and Constitutional Affairs Committee, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Parliamentary Joint Committee on Human Rights, regarding proposed amendments to the Native Title Act ('the NTA'). This statement is to be submitted to each of these committees.

4. Congress notes Minister Roxon's statement given at the 20th anniversary of the Mabo Decision regarding Labor's understanding of the 'need to focus on incremental reform'[1] and Congress therefore welcomes the opportunity to hold ongoing discussions regarding reforms to be pursued through incremental stages. However, Congress notes that an incremental approach to law reform must acknowledge the injustices and discrimination in the operational native title laws and systems.

5. We urge the Australian Government to work closely with the Aboriginal and Torres Strait Islander peoples in any development of proposals to amend the Native Title laws to ensure compliance with the rights of the Indigenous Peoples and international human rights law.

6. Congress acknowledges the advocacy of the National Native Title Council that has resulted in some of the provisions in the Amendment Bill. Aware of their efforts, Congress supports the specific amendments outlined in this Bill, but remains concerned overall that improvements contained in the Bill do not go far enough to ensure the rights and interests of Aboriginal and Torres Strait Islander peoples are respected and upheld.

7. Congress notes and welcomes the findings of the Law Council of Australia that '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.'[2]

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[1] http://www.attorneygeneral.gov.au/Speeches/Pages/2012/Second%20Quarter/6-June-2012---Echoes-of-Mabo---AIATSIS-Native-Title-Conference.aspx

[2] 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

8. Whilst the Government has taken action to 'improve the operation of the native title system, with a focus on improving agreement making, encouraging flexibility and claim resolution and promoting sustainable outcomes,'[3] Congress does not consider the Native Title system is adequately recognising and protecting Aboriginal and Torres Strait Islander peoples' secure title to their lands, territories and resources or adequately respecting our peoples' right to economic development through the resources of our lands and territories.[4]

9. Congress supports complete ownership rights for Aboriginal and Torres Strait Islander peoples over their historical and traditional lands, territories and resources. It has been the historical failure since the original British settlers arrived in Australia to respect the property rights of the Aboriginal and Torres Strait Islander peoples that has led to massive injustices and exploitation of the First Peoples.

10. Congress expects the Australian Government will, in addressing laws concerned with Aboriginal and Torres Strait Islander peoples' native title, meet its international obligations derived from its responsibilities to the UN Charter, the human rights treaties and the United Nations Declaration on the Rights of Indigenous Peoples ('the Declaration').

11. Congress reminds Parliament that it will oppose legislation and government policies and actions that serve to limit or remove the right of the Aboriginal and Torres Strait Islander peoples to self-determination. We advocate for the right to exercise self-government or autonomy over any matter that directly affects our peoples, our development and our future. Any proposals for development within our territories or that involves third party exploitation of our resources must occur on mutually agreed terms. Thus the free, prior and informed consent of the Aboriginal and Torres Strait Islander peoples is required.

12. Congress continues to reject the burden of proof placed upon Aboriginal and Torres Strait Islander peoples in relation to our rights to own our lands, territories and resources. The current requirement for proof by our peoples is racially discriminatory. This procedural requirement merely serves as the barrier to justice and an ongoing, defensive mechanism for shielding the historical theft of lands, territories and resources.

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

14. Congress points out that until the Aboriginal and Torres Strait Islander peoples are provided with adequate financial and technical resources to protect their property and rights to development, in accordance with the right of self-determination, the historical injustices through racially-discriminatory laws and procedures will continue to prevail and oppress the First Peoples of Australia.

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[3] Native Title Amendment Bill 2012, Explanatory Memorandum, Outline p 2

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

Compatibility with Human Rights

Relevant International Human Rights Instruments

- Universal Declaration on Human Rights
- Covenant on Civil and Political Rights
- Covenant on Economic Social and Cultural Rights
- Convention on the Elimination of All Forms of Racial Discrimination
- Declaration on the Rights of Indigenous Peoples

Recent Reports on Australia's Human Rights Obligations

15. The following quotations are derived from recent reports on Australia's Human Rights performance and which address the issues of native title and land rights for the Aboriginal and Torres Strait Islander peoples.

Universal Periodic Review, UN Human Rights Commission

86. The following recommendations will be examined by Australia which will provide responses in due time, but no later than the seventeenth session of the Human Rights Council in June 2011 …

> *86.24 Fully implement the Racial Discrimination Act and the revision of federal laws to be compatible with the United Nations Declaration on the Rights of Indigenous Peoples …*
> *86.102 Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life …*
> *86.106 Revise its Constitution, legislation, public policies and programmes for the full implementation of the Declaration of the Rights of Indigenous Peoples …*
> *86.110 Strengthen efforts and take effective measures with the aim of ensuring enjoyment of all rights for indigenous people, including participation in decision-making bodies at all levels*[5]

Committee on the Elimination of Racial Discrimination

Reiterating in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, and the fact that despite a large investment of time and resources by indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5). The Committee urges the State party to provide more information on this issue, and to take the necessary measures to review the requirement of such a high standard of proof. The Committee is interested in receiving data on the extent to which the legislative reforms to the Native Title Act in 2009 will achieve

[5] Report of the Working Group on the Universal Periodic Review: Australia, 24 March 2011, UN Document A/HRC/17/10

"better native title claim settlements in a timely manner". It also recommends that the State party enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources.[6]

Human Rights Committee

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2). The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo, 1992; Wik, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands. The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.[7]

The Committee, while welcoming recent reforms, notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee's recommendations adopted in 2000. (arts. 2 and 27) The State party should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples.[8]

The Right to Property

16. Article 17 of the Universal Declaration of Human Rights states that '(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.'

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[6] Para 18, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Report on Australia, 13 September 2010, UN Document CERD/C/AUS/CO/15-17

[7] Concluding Observations of the Human Rights Committee: Australia, 24 July 2000, UN Document CCPR/CO/69/AUS

[8] Para 16, Concluding Observations of the Human Rights Committee: Australia, 7 May 2009, UN Document CCPR/C/AUS/CO/5

17. The Convention on the Elimination of All Forms of Racial Discrimination prohibits the discriminatory treatment of property rights. Article 5 of the Convention states that everyone has the right to equality before the law without distinction as to race, colour and national or ethnic origin, including the "right to own property alone as well as in association with others" and "the right to inherit". The human rights treaty body established under this Convention provides an elaboration on this right in an address of the situation of the Indigenous Peoples of the world.

    "The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises… The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."[9]

18. The right of Indigenous Peoples to property, in the form of lands and territories, is specifically and intentionally addressed in the UN Declaration on the Rights of Indigenous Peoples. Articles 25-32 of the Declaration relate to lands, territories and resources. While the first two articles elaborate the significant relationship between Indigenous Peoples and their territories, Article 27 requires 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.'[10]

19. Congress draws distinction between the requirements of the Native Title laws, which merely extend to clarify where land ownership of the First Peoples might have survived the imposition of British and Australian law over their territories combined with the additional requirement to provide evidence of continued customary practices, and the human rights standard, requiring independent and balanced adjudication of the rights of the Aboriginal and Torres Strait Islander peoples. Significant amendment is required to the Native Title laws to comply with the human rights standard.

20. Congress requests an amendment to the NTA that 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.

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[9] Committee on the Elimination of Racial Discrimination, General Comment 23, 1997

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

21. 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, 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, 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.'[11]

22. The right to territories includes a right to bodies of water and seas. 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.[12] 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.

23. Congress supports the repeal of s 26(3) of the NTA to allow procedural rights to offshore areas.

The Right to Self-Determination

24. The United Nations has determined that Indigenous Peoples have the right to self-determination. This right of peoples was realised in 2007 when the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples. The resolution of the General Assembly acknowledged that Indigenous Peoples are equal to all other peoples of the world and as such have the right to self-determination.[13]

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[11] 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 December 2012)
[12] 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.
[13] UN Declaration on the Right of Indigenous Peoples, Articles 2 & 3

25. The right of peoples to self-determination is affirmed in the Covenant on Civil and Political Rights[14] and the Covenant on Economic, Social and Cultural Rights.[15] The Aboriginal and Torres Strait Islander peoples of Australia have the right to be recognised as a distinct peoples with the right to self-government and autonomy as well as to participate, if they so choose, in the political, social, cultural and economic life of the State.[16] In the exercise of the right of self-determination Aboriginal and Torres Strait Islander peoples have the right to maintain our own political, economic and social systems or institutions and have the rights to develop our own representative institutions for the exercise of free, prior and informed consent over legislative and administrative matters which may affect us.[17]

26. Whilst the amendments are beneficial in current circumstances, the Native Title Amendment Bill 2012 is not wholly compatible with the International Covenant on Civil and Political rights (ICCPR). In its 'Concluding Observations on Australia' paper from May 2009, the Human Rights Committee expressed the following concerns[18:]
    - Indigenous peoples are not sufficiently consulted in decision-making processes
    - despite recent reforms, the continued high cost, complexity and burdens of proof for claims under native title legislation;
    - the lack of adequate services to ensure equality in access to justice for Indigenous people.

The Right to Development

27. The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights have identical first articles.

28. *"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."*[19]

29. Congress supports the NTA be updated to ensure that native title rights and interests include resource use of a commercial nature. The right of our peoples to economic development through the utilisation of the natural resource and wealth of our territories should not be denied by Australian law.

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[14] Article 1, Covenant on Civil and Political Rights
[15] Article 1, Covenant on Economic, Social and Cultural Rights
[16] Article 4, UN Declaration on the Rights of Indigenous Peoples
[17] Articles 18-20, Declaration on the Rights of Indigenous Peoples
[18] http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc
[19] Article 1, Covenant on Civil and Political Rights, and Article 1, Covenant on Economic, Social and Cultural Rights

The Right to Culture

30. Congress is aware that fundamental shifts in cultural heritage protection legislation in the various State jurisdictions have given rise to considerable concern for the Aboriginal and Torres Strait Islander peoples.

31. In Queensland, New South Wales and Victoria at least, cultural heritage protection has shifted to a 'duty of care' model. Under this arrangement government no longer assumes responsibility and the risk and liability to protect and manage Aboriginal cultural heritage rests with the proponent for development. This removes government responsibility for adequate protections and increases the risk of corrupt practices and destruction of sacred sites.

32. In New South Wales, the duty of care obligations can be satisfied merely by a search of the government operated sites register.[20] 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.

33. The existing laws operating at the National and State and Territory levels are in breach of Australia's international human rights obligations.

    Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;[21]

34. 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.'

[20] Sections 87(2) and 90Q *National Parks and Wildlife Act* 1974 (NSW)
[21] Article 8, UN Declaration on the Rights of Indigenous Peoples

Native Title Amendment Bill 2012

36. Congress provides the following response to the Native Title Amendment Bill 2012:

Historical Extinguishment

37. Congress notes that the Bill seeks to provide parties with more flexibility to disregard historical extinguishment over parks and reserves. We welcome this change as a step consistent with just outcomes.

38. Congress questions the extent and effectiveness of the proposed inclusion of a new s 47C in relation to parks and reserves and is concerned that s 47C will require an agreement from the Commonwealth, State or Territory before extinguishment can be disregarded. We submit that s 47C should 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)).

39. We submit that further reform is needed to expand the circumstances in which historical extinguishment can be disregarded so as to include all Crown land.

40. 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.

41. 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.

42. 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.[22] 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.

Negotiations in Good Faith

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

[22] (2003) 134 FCR 155, at Questions 1 and 2 and the answers thereto, and at [84]-[90]

44. Congress supports the submissions of the Native Title Services Victoria and the National Native Title Council that discuss the "good faith" provisions and suggest areas for further consideration.[23]

45. Congress supports the extension of the negotiation period from six months to eight months in s 31A(3) of the NTA. However, Congress notes that there may be limited practical impact of this extension to benefit Aboriginal and Torres Strait Islander peoples and that further consideration is required to ensure that our peoples' right to free, prior and informed consent is protected in negotiations.

46. Congress supports the amendments in s 36 (2) that will require the party seeking arbitration to show that they have negotiated in good faith where it is asserted that the party did not negotiate in good faith, but notes that the wording is unnecessarily complex.

Processes for Indigenous Land Use Agreements

47. Congress supports the proposals for simplifying amendments to ILUAs, broadening the scope of body corporate ILUAs and improving authorization and registration processes for ILUAs.

48. ILUAs have led to very positive outcomes in certain cases, but many of these agreements are superficial and do not leave Aboriginal and Torres Strait Islander communities with capacity to develop or progress into the future.[24] Many 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.

49. Congress supports a simplified registration process for minor ILUA amendments as provided for in the proposed section 24ED.

50. Congress also supports extension of the operation of s 24BC to broaden the scope of corporate ILUAs.

51. The proposed new s 24CK removes the objection process for ILUAs that are certified by a native title representative body. This new requirement will mean that persons who object to a certified ILUA will only have access to judicial review and therefore Traditional Owner groups who are not represented by a NTRB or a Native Title Service Provider could face additional expenses and complexities.

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[23] See National Native Title Council, submission to the Senate Legal and Constitutional Affairs Committee and the House of Representatives Standing Committee's inquiry in to the Native Title Amendment Bill 2012, p 5.

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

Future Reform of the Native Title Process

53. Despite a proposed commitment to incremental improvements to Native Title laws by the Government Congress remains concerned that the proposed draft amendments to the Native Title Act do not go far enough to provide much-needed protection for the rights and interests of Aboriginal and Torres Strait Islander people.

Recognition of Aboriginal and Torres Strait Islander Title to Lands and Water

54. The Native Title system is not protecting Aboriginal and Torres Strait Islander property rights through recognised secure title to land. The attention to negotiated agreements to address pressures for development of particular lands is often resulting in agreements which do not provide secure title by the Aboriginal and Torres Strait Islander peoples to their lands and territories. Aboriginal and Torres Strait Islander peoples must have complete ownership rights commensurate with property rights, and be able to maintain control over their historical and traditional lands and waters. Congress requires the Australian Government to fulfil its international obligations under the UN Charter, the human rights treaties and the United Nations Declaration on the Rights of Indigenous Peoples.

Onus of Proof

55. 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. 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.

Financial and Technical Support

56. Despite two decades of funding programs to assist the Native Title Service Providers the Aboriginal and Torres Strait Islander peoples are not able to access much-needed funding to exercise their collective interests in the land and resources including the natural environment. The Native Title programs are limited forms of funding which do not go beyond the bounds of the service organisations. Congress sees the need to ensure that land-owners have access to greater levels of financial and technical assistance in order to maintain their institutions and responsibilities for care and management of their territories.

57. In certain instances these responsibilities can be extensive, as demonstrated in the 'Prescribed Body Corporate' examples. The narrow focus upon Native Title programs has led to neglect of the land management and cultural heritage protection of the First Peoples. The imposition of a modern, western economic model within the national boundaries leaves Aboriginal and Torres Strait Islander people without access to their traditional resources. A modern model for financial and technical support is needed.

The United Nations Declaration on the Rights of Indigenous Peoples

58. Congress is pleased the Statement of Compatibility with Human Rights includes some of the principles in the Declaration on the Rights of Indigenous Peoples, including that the principles in Articles 25-32 are also relevant to the NTA amendments.

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

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