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Dear Sir or Madam

Reforms to the Native Title Act 1993 (Cth): Options Paper November 2017

We refer you to your invitation for submissions regarding the Commonwealth Attorney General's Reforms to the Native Title Act 1993 (Cth): Options Paper, November 2017 (the Options Paper).

South Australian Native Title Services (SANTS) is the Native Title Services Provider (NTSP) for South Australia performing all of the functions of a Native Title Representative Body (NTRB) pursuant to Section 203FE of the *Native Title Act 1993* (Cth) (the Act). SANTS is incorporated as a public company limited by guarantee under the *Corporations Act 2001* (Cth).

SANTS welcomes the opportunity to make the following submissions in relation to the Options Paper. Where appropriate, we cross-referenced the proposals and table numbering used in the Options Paper.

Section 31 Agreements

SANTS notes that there is potential doubt over the validity of current and previous s31 agreements where the agreements have been executed in a manner inconsistent with the *McGlade* decision.[1] Currently the *McGlade* decision could apply to s31 agreements, which relative to Indigenous Land Use Agreements (ILUAs) were fixed through the *recent Native Title Amendment (ILUA) Act 2017* (Cth). This would require all of the applicant to sign a section 31 Agreement for it to be valid.

A proposal in the Options Paper is to first confirm the validity of existing s31 agreements where they have been executed only by a majority of the Applicant. SANTS supports such an amendment and contends any confirmation of the validity of s31 agreements should equally apply to Part 9B Agreements under the South Australian *Mining Act 1971,* which is an alternative scheme under s43 of the Act.

In relation to future s31 agreements, SANTS supports Option 3 which would provide that the majority of the applicant are mandatory parties to s31 agreements. However, we do not support an amendment to the Act requiring an authorisation process in respect of all s31 agreements. Where the section 31 agreement relates

[1] *McGlade v Native Title Registrar* (2017) FCAFC 10.

to exploration, then an authorisation process would represent an unnecessary burden on the claim group and the proponent. With respect to s31 agreements, or Part 9b agreements in South Australia, made in relation to mining production, our practice has been to have the agreements authorised at a community meeting.

Exploration is highly speculative and a costly process for explorers to comply with as it is. If authorisation is required for exploration s31/Part 9B agreements, this means a community meeting. The cost of an authorisation meeting, both in time and resources, is not justified given the typical scale and nature of exploration agreements, including effect on native title rights and interests.

SANTS submits that there may be justification for an authorisation process in relation to a mining production agreement or a compulsory acquisition agreement. At noted above, it is our practice to ensure or advise claim groups to hold a whole of claim group / community meeting for production agreements. Thus if there were an authorisation requirement for these more significant agreements, in practical terms, at least in South Australia, it is not likely to have much of a corresponding cost increase. SANTS encourages the government to further consider how an authorisation process may only be required for some s31 agreements including mining production agreements.

Scope and Authority of the Applicant

A1 – SANTS is of the view that the native title claim group is presently able to define the scope of the authority of the applicant, including the way in which the applicant is to make decisions, for example by majority. We are not aware of any judicial authority to the contrary. Nevertheless, the justification for the proposal is to make it clear to stakeholders the scope of the applicant's authority and the legal status of such directions or constraints. Stakeholders and claim groups are required to negotiate in good faith, and this would include one presumes, an obligation on the applicant to disclose any relevant constraints on their authority, if relevant. If greater transparency is the objective, then the proposal is not clear on how this will be achieved. Accordingly, an amendment based on this concern, may not be justified. However, SANTS does not object to proposed amendments to confirm the ability of a claim group to limit or place conditions on the authority of the applicant.

A2 – SANTS supports an amendment to confirm that the applicant may act by majority. SANTS contends that this should be a standalone amendment and not tied to the above proposal (A1). This would provide a clear default position that the applicant can make decisions by majority. Any variation of this default position (i.e., applicant must act by consensus) would have to be addressed by a claim group in authorising the applicant (i.e., as a condition imposed on the applicant).

A3 – SANTS support this proposal subject to appropriate provisions to ensure the relevant safeguards are met and protected through prescribed evidence established by the Act or regulations (e.g., an affidavit for consent to be removed, a death certificate for death, and some type of official medical record relating to incapacity).

A4 – SANTS consider that a "self-executing" arrangement regarding the replacement of a member of an applicant may currently able to be established on original authorisation to cover for such circumstances contemplated in the Options Paper. It is arguable that no re-authorisation is needed if this happens up front, hence, removing the costs of a re-authorisation meeting. SANTS acknowledges, however, that a s66B application would still be required. SANTS thus supports the proposal on this basis to give legal status to such arrangements.

A5 – SANTS note that the recent decision in *Gebadi v. Woosup [2017] FCA 1467* which found that the applicant owes a fiduciary duty to the claim group when negotiating agreements. We support this decision and add that this fiduciary duty extends to all dealings throughout the claim process until determination. While protections may apply at common law, SANTS support amendments to provide a legislative basis for the fiduciary duty owed by the applicant to the claim group.

A6 -SANTS supports that any amendments passed concerning authorisation should only apply prospectively.

Alternative Agreement making processes

B1 –SANTS is open to legislative amendments which provide Registered Native Title Body Corporates (RNTBCs) with more autonomy in the making of certain decisions, including entering into contracts. The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations) does provide a mechanism to allow certain native title decisions (i.e., those which are not subject to an ILUA or s31 agreement, not about allowing non-common law holder members into the membership of the Prescribed Bodies Corporate (PBC), or not about providing consent to alternative consultation processes in the PBC constitution), to occur without following PBC Regulation 8. That is, an alternative consultation process may be approved and adopted under PBC Regulation 8A to enable the RNTBC to make certain decisions and enter into associated contracts. It should also be noted that the PBC Regulations do not prevent the RNTBC from entering into a contract without consulting and obtaining common law holder consent where it is not a *native title decision* or where the functions outlined in the PBC Regulations do not require native title holder consent.

At present, the types of decisions where a RNTBC is not required to adhere to Regulation 8 are quite limited. While it is paramount that the rights and interests of native title holders are protected (including procedural rights in the making of certain decisions), SANTS believe there is scope to broaden the types of agreements for which Regulation 8 may not apply so long as this is not extended to effecting any surrender of native title rights and interests. In South Australia, an example where a more streamlined approach would be appropriate is exploration agreements under Part 9B of the *Mining Act*.

SANTS is open to considering the precise drafting in relation to this proposal. SANTS would likely support amendments to streamline the making of agreements which are of low impact and low risk and native title holders have provided their consent to the RNTBC for the making of such agreements (i.e., a standing consent to the RNTBC to negotiate and enter into exploration agreements).

B2 – SANTS does not support an amendment removing the protection afforded by s211 by enabling native title holders to vary certain rights by way of an ILUA.

B3 – SANTS does not support amendments to allow PBCs to contract out of the compensation and future acts provisions of the Act.

B4 – SANTS does not support the proposal to amend s24LA of the Act to permit the doing of low-impact future acts following a determination that native title exists. Current natural resource management regimes in South Australia do not in themselves provide adequate protection of the rights and interests of native title holders. These matters are best dealt with through an ILUA as per current requirements of the Act, and these provisions have been successfully utilised in South Australia to address the interests of the respective parties.

Streamlining existing agreement making

C1 – SANTS supports the proposal to allow a body corporate ILUA area to include areas where native title has been extinguished. The practicalities of this approach warrant amendment to the Act.

C2 – SANTS supports the proposal to allow minor technical amendments to an ILUA without requiring re-registration where the native title parties to the ILUA have consented (be they claimants, holders, or persons who may hold native title, or representative bodies).

C3 – SANTS supports the proposal which would provide that the Registrar is not required to give notice of an area ILUA if it was not satisfied that the ILUA could be registered. This would remove a cumbersome and unnecessary burden on the Registrar.

C4 – SANTS does not support a proposal to remove the requirement that a PBC consult with NTRBs/NTSPs on native title decisions. This requirement allows a NTRB/NTSP to put its views to the PBC prior to any decision being made on the native title decision. It allows valid concerns to be expressed drawing upon the vast experience of NTRBs/NTSPs in native title management. It also provides the NTRBs/NTSPs with a mechanism to increase their corporate knowledge in respect of proposals and ways by which native title claim groups and third parties deal with native title matters.

C5 – SANTS supports the proposal to provide that the future acts regime applies to land covered by a claimant application seeking the benefit of section 47B of the Act. SANTS also submits that the future act definition should be amended to include land held by the Aboriginal Lands Trust of South Australia. The *Aboriginal Lands Trust Act 1966* (SA) contains no mechanism to protect the interests of native title claimants in relation to activities on ALT Land, and native title claimants are left out of decision making in respect of this land. SANTS also submits that the amendment should extend to land claimed under s47A of the Act.

C6 – SANTS supports the proposal to amend section 24EB of the Act to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act. SANTS seeks the opportunity to comment further on specific drafting in this regard. SANTS notes a number of ILUAs it has been involved in whereby consent to future acts is provided, with compensation to be agreed or litigated failing agreement at a future point.

C7 – SANTS does not support the proposal as it currently stands to amend section 199C of the Act to clarify that removal of details of an ILUA from the Register does not invalidate a future act that is the subject of the ILUA. SANTS is open to considering further variation on such an amendment which restricts the validity of such future acts to those acts which had taken place prior to the ILUA being removed from the Register and also subject to appropriate compensation attaching to the consent to the future act also having been discharged at the time of removal from the Register.

C8 – SANTS note that under Part 9B of the *Mining Act* the State Government is not a party to agreements. On a broader perspective, SANTS supports the submission made by the National Native Title Council (NNTC) on this matter.

C9 – SANTS does not support the proposal to allow a future act subject to section 24MD to take place without an adjudication in the event that an objection to the doing of the future act has been made. The rights of the objector to be heard must be protected and not diminished by proposed amendments.

C10 – The proposal to allow electronic transmission of notices is not fully supported by SANTS. While SANTS agrees with the intent to enable use of cheaper and more efficient communication technologies, many of the native title groups in South Australia (and elsewhere) reside in remote locations where access to such

electronic communications is limited. SANTS thus supports the position put forward by the NNTC, which would enable use of electronic communications where the relevant NTRB/NTSP or PBC has consented.

C11 – In respect of the proposed amendment to s251A, SANTS supports the submission of the NNTC which references and supports related amendments as proposed in the *Native Title Amendment Bill 2012* (Cth).

Indigenous Decision Making

D1 – The Options Paper proposes amendments to allow native title claim groups to choose a preferred method or process of decision-making, and RTNBCs to use its preferred method of obtaining native title holder consent to a native title decision. SANTS notes the recent rejection by the NNTC and NTRBs/NTSPs of *McGlade* amendments towards restructuring authority making provisions in ss251A and 251B respectively as part of that process.

SANTS submits that the Act should not be amended (nor should the PBC Regulations) at this time in the manner proposed. Although these sections of the Act have been utilised by litigants in the past as a way to try to question authorisation processes, SANTS views at this time that the sections are an important reminder to all that in matters of native title decision making, the observance and acknowledgement of Aboriginal laws and customs remains paramount.

Claims Resolution and process

E1 – SANTS does not support the proposal that section 138B(2)(b) of the 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. The Applicant should be a part of this process.

E2 – SANTS does not support the proposal that section 156(7) of the Act, which provides that the National Native Title Tribunal's (NNTT) power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed.

E3 – SANTS supports the proposal to amend section 47(1)(b)(iii) of the Act to permit the making of a determination that native title co-exists with a pastoral lease held by the claimants where claimants are members of a company that holds the pastoral lease.

E4 – SANTS supports the proposal to amend Part 2, Division 5 of the Act to allow a RNTBC to be the applicant on a compensation claim. SANTS requests an opportunity to review the details of proposed drafting. SANTS notes that in terms of settlement of compensation claims in South Australia, our experience would dictate that such amendment could streamline the settlement process, which requires the RNTBC to be parties to any Settlement Deed. It would make sense to allow the RNTBC to be the applicant to avoid a multiplicity of parties / persons from whom authority is granted, prior to a settlement.

E5 – SANTS supports this proposal to clarify that the decision to make a compensation application is a native title decision. SANTS note that this amendment is likely to be conditional upon the amendment outlined in E4 above being made.

E5 – SANTS supports the proposal to introduce a new section into the Act allowing for historical extinguishment over areas of national, state or territory parks to be disregarded for the purposes of making a native title determination. SANTS submits that such amendment should apply to all current native title claims without the need for such claim to be amended, so that the benefit of ignoring any past extinguishment is claimed as at the date the relevant claimant application was made. If this is not provided for, a lengthy and

costly re-authorisation process would be required to re-file potentially hundreds of claims nation-wide. In other words, SANTS submits any amendment should operate to automatically claim the benefit if at the time a relevant application was made there was a relevant park within the external boundaries of the relevant claim.

Post determination dispute management

SANTS has reviewed the submission of the NNTC in relation to the proposed arrangements to improve post determination dispute management. SANTS unequivocally adopts the submission of the NNTC in relation to each proposed arrangement.

In relation to the following aspect of the NNTC submission:

> *The COAG Investigation recommended that the CATSI Act be amended to remove the discretion of PBC directors to refuse to accept a common law holder's membership application, even if the prospective member meets eligibility requirements. The proposed amendment would allow refusal of membership for an individual who meets the PBC's membership criteria only in exceptional circumstances. The NNTC is generally supportive of preventing situations where directors can arbitrarily exclude prospective members who are relevant common law native title holders. However, a PBC must retain the ability to undertake processes leading to the exclusion from membership of persons who have not acted in the best interests of the corporation or have otherwise demonstrated misbehaviour. The NNTC believes further discussion need be undertaken to determine the final legislative framing of this provision.*

SANTS makes the point that it will be at times difficult for ORIC (or anyone other than the common law holders) to determine whether membership has been refused for an individual who meets the PBC membership criteria, at least in the South Australian context. This is because typically, determinations define common law holder membership (which in the experience of SANTS is usually the eligibility criteria for membership to the relevant PBC) as being persons <u>descended</u> from named ancestors, <u>who identify</u> as belonging to a particular group, and <u>are accepted</u> by the common law holders as being belonging to that group in accordance with the traditional laws and customs of the group/society. The point which SANTS wish to make is that, while it may appear and able to be established that a person is eligible for membership to a PBC/definition of common law holder based on descent, the difficultly arises for a body such as ORIC to objectively determine whether a person identifies as a common law holder and is accepted by other common law holders as a common law holder?

SANTS recommends that consideration be given to enacting a regime that codifies how a person is accepted as a common law holder, for example, through a native title decision of common law holders made at a meeting open to all common law holders or all members of the PBC.

This issue raises fundamental difficulties for any mechanism to modify the current arrangements in terms of director's powers to refuse membership even if a member is eligible. An ill-crafted arrangement could result in further uncertainty and the regulator, be it an NTRB/NTSP, the NNTT or ORIC, faced with a myriad of uncertainty as to their jurisdiction.

State and territory proposals

At this stage SANTS does not seek to comment on the State and territory proposals outlined at Attachment G of the November 2017 Commonwealth Attorney General's Department Options Paper. SANTS supports any additional comments made by the NNTC in regard to these and other matters.

SANTS notes the substantial amendments canvassed by the Options Paper and submits that the State and territory proposals are of lesser importance and should not be considered a priority for immediate reforms to the Act and associated legislative and regulatory schemes.

We thank you for the opportunity to provide comment on the Options Paper and proposed amendments to the *Native Title Act*. Should you wish to discuss any aspect of our submission, please do not hesitate to contact Andrew Beckworth (Principal Legal Officer; andrewb@nativetitlesa.org) or me at SANTS.

Yours sincerely

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