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SUBMISSIONS OF SOUTH AUSTRALIAN NATIVE TITLE SERVICES WITH RESPECT TO THE NATIVE TITLE AMENDMENT (REFORM) Bill 2011

This submission is made by the South Australian Native Title Services ("SANTS") in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Reform) Bill 2011 ("the Bill").

SANTS is the Native Title Service Provider ("NTSP") for South Australia performing all of the functions of a representative body pursuant to Section 203FE of the *Native Title Act 1993* (Cth) ("the NTA").

SANTS is committed to achieving sustainable social, cultural, economic and political outcomes through native title. Importantly, this commitment extends to the protection and promotion of the rights and interests of native title groups not only in the ascertainment of native title, but furthermore in the careful negotiation of various agreements relating to native title rights and interests.

Accordingly, SANTS welcomes the opportunity to contribute to the national discussion on policy and governance reforms with respect to the proposed amendments of the Native Title Act. This submission will assess the package of reforms presented in the Bill, responding to each item under the respective proposals.

Submission

General Comments

SANTS strongly supports reform of the NTA that address the otherwise onerous burdens placed on claimants in achieving a positive determination of native title. This support extends to reforms that likewise facilitate and support the engagement of native title parties through the negotiation process with respective parties.

Accordingly, SANTS in general supports the changes as proposed in the Bill, and commends the purpose of the proposed amendments as seeking to "enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples".[1]

Item 1 (Addition Object – UNDRIP)

SANTS supports the inclusion of an additional object referencing the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). It is SANTS' submission that native title practices and the government's commitment to the recognition of Aboriginal and Torres Strait Islander peoples' entitlement to their traditional lands is commensurate with international human rights obligations. Specifically, the notion of 'free, prior and informed consent of Indigenous peoples in matters affecting them' is a fundamental precursor to ensuring effective participation of Aboriginal and Torres Strait Islander people throughout all aspects of the native title process. This position is supported by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda, who stated at the July 2010 Expert Mechanism on the rights of Indigenous peoples in Geneva:

> *'It therefore becomes clear that in order for indigenous peoples to enjoy the right of self-determination we must be able to effectively participate in matters that affect our lives. The process of effective participation must ensure that decisions reflect the aspirations and worldviews of the indigenous peoples affected, and are made in accordance with free, prior and informed consent.'*

Notably, the requirement of providing 'free, prior and informed consent', and other mechanisms supporting this requirement consistent with the UNDRIP principles has been incorporated as a standard inclusion in agreements negotiated by SANTS. It is SANTS' experience through the negotiation of these agreements that most non-native title parties have not disputed the need for this basic requirement.

SANTS would further submit that the incorporation of these principles as objects in the NTA will provide renewed focus on the original intention of the legislation and the moral foundation upon which it was created. Specifically, the existing preamble of the NTA recognises not only the 'entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands', but furthermore, the rectification of past injustices and to ensure that 'Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'. Importantly, the

[1] See Explanatory Memorandum for the Native Title Amendment (Reform) Bill 2011 circulated by authority of Senator Siewert

beneficial purpose clearly outlined in these sections is consistent with the principles otherwise enunciated in the UNDRIP.

Furthermore, SANTS also considers that the addition of these principles within the NTA would provide an effective opportunity for the Australian Government to properly implement the UNDRIP and thus ensure compliance in accordance with the State's formal support of the Declaration.

Item 2 (reference to 'effective' heritage legislation – s24MB(1)(c))

SANTS' supports the proposed amendments to section 24MB. Specifically, it is SANTS' experience that the legislative scheme for heritage protection within South Australia is not always a sufficient mechanism to effectively protect Aboriginal cultural heritage.

Nonetheless, SANTS' agrees with the concern raised by the Kimberly Land Council regarding the absence of a definition for 'effectiveness'. On this point SANTS would further agree with the submission made by the Kimberly Land Council that a practical application of heritage legislation should be considered in determining whether or not this section has been satisfied.

Item 3 (non-extinguishment of NT in compulsory acquisition)

SANTS supports this amendment, although notes that this is of limited application in South Australia.

Item 4 (right to negotiate to apply to offshore areas)

SANTS strongly supports this amendment.

SANTS considers that the current limitation of procedural rights afforded to claimants under s 26(3) is a major inconsistency within the NTA. Indeed, the rights and interests of Aboriginal and Torres Strait Islander people, including connection to Country, are as strong to waters as to land. Further, the direct impact of activities on offshore areas, including the effect on native title rights and interests, is often far greater than the immediate environmental 'footprint' of such activities. In repealing this section, SANTS would submit that greater certainty will be achieved for all parties to native title negotiations.

Items 5 – 9 (strengthening good faith requirements in negotiation)

SANTS strongly supports expansion on the current requirements for parties to negotiate in 'good faith' in relation to future acts, and in particular, the insertion of proposed subsection 31(1)(a) subject to the comments below regarding the disclosure of confidential or commercially sensitive information.

It is SANTS' experience that the significant evidential burden for establishing absence of good faith in negotiations has often undermined incentives to progress agreements concerning proposed activities with external parties. This situation is no doubt perpetuated through a lack of certainty in relation to the meaning and effect of the statutory requirement to "negotiate in good faith." In addition, the burden of proving such rests solely on the native title party as opposed to the proponent of a proposed future act.

As outlined in the Explanatory Memorandum of the Bill, not only is this procedurally unfair, SANTS' would further submit that the practical effect of this current legislative scheme is to significantly disadvantage native title parties by restricting the capacity of these parties to ensure a proper negotiation process is followed. Significantly, this in turn directly affects the capacity for native title parties to both exercise and protect their rights and interests.

SANTS' submits that greater clarity with respect to these provisions will not only succeed in expediting the negotiation process through encouraging 'better agreement-making' to the benefit of all parties, but furthermore, this will provide native title parties with a far more effective legal safeguard to protect their native title rights and interests under the NTA. SANTS would further submit that this reform is particularly important in light of the Full Federal Court decision in *FMG Pilbara PTY Ltd v Cox* (2009) 175 FCR 141. Likewise, SANTS' considers that the effectiveness of this safeguard is vital in ensuring that the proscribed objectives of the NTA at least have an opportunity to be satisfied.

Whilst supporting the expansion and clarification of the 'good faith' requirements as set out in the Bill, SANTS' agrees with the submissions of both the Kimberly Land Council and the North Queensland Land Council in their concern with the exclusion of confidential or commercially sensitive information from the disclosure of relevant information. On this point, SANTS supports the submission of the Kimberly Land Council that it is within the ability of the respective parties to determine arrangements for the handling of such information if necessary to progress negotiations. Accordingly, SANTS does support the inclusion of this requirement as a statutory restriction.

<u>Item 10 (allowing profit sharing royalties in arbitration)</u>

SANTS supports this amendment. SANTS considers this amendment will provide native title parties with greater flexibility (and time) to negotiate such terms without the threat of losing such opportunities as a result of arbitration.

<u>Item 11 (strengthening coexistence by disallowing extinguishment)</u>

SANTS strongly supports the measures provided by proposed section 47C, and considers this approach as a means to expedite the consent determination process. In particular, SANTS has experienced situations where a respondent party is willing to disregard prior extinguishment however this has been constrained through the operation of sections 47A and B. SANTS agrees with the submission provided by the Kimberly Land Council that such a mechanism could significantly reduce the time and costs associated with consent determinations by simplifying this process in itself.

In addition, SANTS would further submit that this amendment be extended to provide for retrospective disregarding as well, for example, in situations where an ILUA may be entered into post determination.

Item 12 (shifting the burden of proof)

SANTS supports the introduction of a rebuttable presumption of continuity as a significant amendment that is likely to reformulate the negotiation process between native title groups and respondent parties. Likewise, SANTS strongly supports the intent of this proposal to 'encourage government parties to be more inclined to settle claims with a strong prospect of success'.[2]

Specifically, SANTS sees this proposal as a fundamental step in realigning attitudes of respondent parties negotiating with native title groups and as such facilitating greater outcomes for claimants. From a practical perspective, SANTS would submit that in those cases particularly where continuity is not in issue, this approach would significantly reduce the burden otherwise carried by claimants to establish concepts of society and continuity as set out in *Western Australia v Ward* (2002) 213 CLR 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria*(2002) 214 CLR 422.

SANTS would further submit that such a shift in the burden of proof not only reflects a more accurate statement of the law, it is indeed essential for the legislative scheme to properly provide native title groups 'full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'.[3]

With respect to proposed section 61AB, SANTS welcomes the acknowledgement of the role played by governments or non-Aboriginal or Torres Strait Islander people in causing interruptions in the observation of traditional customs, in some instances leading to the loss of country and associated practices. Importantly, the addition of this section provides an opportunity for both history and context to be taken into account in determinations of native title. This is particularly pertinent given the movements of Aboriginal and Torres Strait Islander people from their respective country was, more often than not, beyond their control.

Item 13 (definition of traditional)

SANTS strongly supports the insertion of the proposed subsections 223(1A)(1B)(1C) and (1D) as a more realistic interpretation of the maintenance and continuity of traditional practices and cultural values over time. SANTS' notes that the current restrictive interpretation placed on section 223 fails to appropriately capture the dynamic nature and context of 'traditional practice' creating significant barriers to cultural resurgence.

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[2] As outlined on Page 12 of the Second Reading Speech of the Native Title Amendment (Reform) Bill delivered by Senator Rachel Siewert

[3] See preamble of NTA

Item 14 (commercial nature of NT rights)

SANTS supports the proposed amendment of section 223(2) in providing that native title rights and interests can be of a commercial nature. SANTS' strongly supports the economic development of native title groups, and increasing opportunities for wealth creation. SANTS' considers this a necessary development to recognise customary and cultural practices as broader economic activities.

Yours Sincerely,

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***per* Parry Agius**
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