Submission to the

Joint Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs' Discussion Paper

Leading Practice Agreements: Maximising Outcomes from Native Title Benefits

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CONTENTS

1. INTRODUCTION

This submission is made by the South Australian Native Title Services ("SANTS") in response to the Consultation Paper 'Leading practice agreements: maximising outcomes from native title benefits' dated July 2010 ("the Consultation Paper").

SANTS is the Native Title Service Provider ("NTSP") for Greater 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 through the direct negotiation and active management and implementation of native title agreements.

Over the past several years, SANTS has materialised this commitment through the development of a number of projects, including the establishment of Aboriginal Congress of South Australia and the Aboriginal Foundation of South Australia. These entities enhance the Aboriginal community's ability to engage in the native title framework, maximise outcomes and provide pathways to achieve socio-economic structures at a State wide level.

Underpinning the development of these projects and the delivery of associated services, SANTS aims to ensure native title groups themselves are in a position to **autonomously manage** all aspects of their agreements. Accordingly, whilst SANTS recognises and supports the fundamental importance of "sustainability" in native title agreements as outlined in the Consultation Paper, it is the policy of SANTS to promote and strengthen the capacity of native title groups to achieve and manage these outcomes autonomously.

Accordingly, SANTS welcomes the opportunity to contribute to the national discussion on policy and governance reforms within native title agreements. This submission assesses the package of reforms presented in the Consultation Paper and responds to each question raised under the respective proposals.

2. A: GOVERNANCE MEASURES

2.1. Are the governance features discussed above appropriate? Are there other measures that would be more appropriate? Why? Why not?

Before addressing these features individually, it is necessary to consider governance in a more general context. It is SANTS' submission that within South Australia, each native title group and their respective corporate entities (including PBCs) are distinctly unique. These distinctions are manifest not only within the historical, cultural and political relationships underlying each group, but also with respect to practical considerations such as capacity, location and levels of income.

It is the experience of SANTS that recognising these distinctions is a fundamental precursor to determining the nature of support provided to respective PBCs. Failure to do so, may indeed render such assistance ineffective. In light of this experience, SANTS does not support governance measurements that fail to recognise the diversity of conditions and needs in different types of Aboriginal and Torres Strait Islander communities.

Furthermore, it is SANTS' submission that any consideration of governance measures must necessarily contemplate the existing legal framework unique to the native title context. At present, Native Title holders must comply with provisions set out by the CATSI Act, as well as requisite standards set by PBC regulations and policy. It is within this milieu that native title groups/PBCs are required to negotiate and demonstrate their legitimacy to meet the varying expectations between the government/private sector and their own community. In acknowledging the often immense difficulties in reconciling such diverse expectations, SANTS supports governance initiatives that focus on facilitative approaches, rather than mandating further measures that impose additional onerous layers of regulation and compliance on native title groups.

Having considered SANTS position in general, this submission will now turn to the specific governance features proposed by the Consultation Paper.

2.1.1. Incorporating under either the Corporations (Aboriginal and Torres Strait Islander Act) 2006 ("CATSI Act") or the Corporations Act 2001 ("Corporations Act").

SANTS acknowledges that PBCs must be incorporated in accordance with the *Native Title Act* ("NTA"). In SANTS' experience, some native title groups have established PBCs in accordance with the NTA and subsequently decide to use this new entity for all activities, including those not connected to native title.

However, in other instances, this entity (i.e., PBC) will play a far less significant role in the management of community affairs beyond the core PBC functions.

Within South Australia, native title groups have the option of incorporating under a number of different legislative schemes, including the *Associations Incorporation Act 1985* (SA). It is SANTS' experience that the range of options provided under the current framework allows native title groups to autonomously determine which corporate structure to adopt. Importantly, the variety of structures provided by this framework has been necessary when considering the extremely diverse nature and form of native title groups across this state. SANTS submits that the ability to choose between different models of corporate governance structure has enhanced the capacity for native title groups to achieve the outcomes that they consider relevant.

As highlighted above, it is SANTS' position that an effective governance structure must consider the discrete nature of the local community it is otherwise representing. The diversity of this experience highlights the necessity of providing a flexible legislative scheme for incorporation. Accordingly, SANTS does not support increasing the scope of mandatory incorporation beyond what is already contained in the NTA and CATSI Act.

2.1.2. Appointing one or two independent directors

SANTS would support increased flexibility in the appointment of directors. This support extends to the appointment of independent directors where the respective native title group so desires. However, SANTS would oppose any mandatory appointment of independent directors for native title groups. Indeed, whilst some PBCs may in fact decide to appoint independent directors on their own accord, they should not be compelled to make this decision. SANTS strongly believes that PBCs should have the power to make and exercise their own decisions in determining the composition of their respective boards. As briefly touched upon above, it is SANTS' experience that effective governance is facilitated where there is recognition of the complex relationships that provide foundations to respective native title groups. Compulsory appointment of independent board members would undermine the fundamental decision-making processes that give rise to the legitimacy of PBCs within native title groups on a community level. It is SANTS position that mandatory appointment of independent board members would be an inappropriate and paternalistic approach, which would weaken effective governance in the long term.

SANTS further submits that from a practical perspective, this feature fails to recognise the capacity issues that are prevalent in a number of PBCs. For example, within South Australia there are a number of PBCs that quite simply could not afford to appoint independent directors.

Consideration must also be made to current mechanisms that native title groups adopt in seeking independent advice. In SANTS' experience, a number of native title groups have either obtained or acquired expert advice through other means. This advice will often be of a legal or commercial nature in relation to the management of affairs. In addition, there are a number of instances of native title groups entering partnerships and other joint venture arrangements. In doing so, these groups are accessing independent advice outside of their immediate capacity.

2.1.3. Adopting enhanced democratic controls, such as by encouraging transparency and accountability to beneficiaries, including through measures that enable beneficiaries to hold directors to account in discharging their functions, and by requiring directors to inform and explain to members details of payments received under native title agreements and disbursements of the resulting funds (these rights and obligations would not duplicate those already contained in the CATSI or Corporations Act)

Although this feature does not specifically identify the precise nature of the 'enhanced democratic controls', SANTS has nonetheless interpreted this proposal to include further government regulation on the operation of PBCs. Accordingly, whilst SANTS supports in principle the notion of 'encouraging transparency and accountability', SANTS does not consider that such outcomes will be realised by simply increasing the threshold of compliance for PBCs. Furthermore, it is SANTS' opinion that sufficient mechanisms currently exist under the CATSI Act to realise these outcomes, to the extent that this is possible via legislative reform.

SANTS recognises that both governments and native title groups want PBCs to deliver services and provide sound financial management and accountability. However, as reiterated above, it is SANTS' experience that the measurement of accountability will often differ between perspectives of governments and that of native title groups. This position is supported by one of the key messages from the preliminary findings of the Indigenous Community Governance Project,[1] which recognises governments and Aboriginal and Torres Strait Islander people have different criteria for evaluating

[1] J Hunt & D Smith, Centre for Aboriginal Economic Policy Research, electronic publication downloaded from http://www.anu.edu.au/caepr/

effective governance. Here the authors commented that a fundamental divergence between these respective viewpoints related to the 'Indigenous processes and relationships at the heart of many organisations which emphasise internal accountability and communication.'[2] This was stated to lie in contrast to governments' emphasis on 'upwards-accountability, risk avoidance, financial micro-management, and compliance reporting'.

In attempting to deliver increased accountability, this feature quite clearly favours the governmental perspective outlined above. Accordingly, this proposal fails to recognise the fundamental representative structures and decision-making processes reflecting contemporary views held by native title groups in the organisation of their communities and representative bodies. SANTS considers that as a result, such an approach will ultimately fail to support any real long term sustainability for native title groups.

Furthermore, SANTS submits that increasing the regulatory requirements of PBCs will undermine the capacity for these organisations to operate 'accountably' from the perspective of the native title group/community. This will be particularly prevalent in relation to those PBCs that have very limited resources, with these groups consequently being forced to divert such resources away from organisational service delivery. In SANTS' experience, the reality for many PBCs within South Australia is that they simply would not have the capacity to absorb the proposed measures without compromising the effectiveness of their role within the community. Governance and compliance arrangements currently existing under the CATSI Act already place onerous requirements on PBCs, more so than other legislative schemes that regulate incorporation and corporate affairs.

Rather than facilitating opportunities for native title groups to effectively determine and develop their representative bodies autonomously, this policy feature would introduce yet another hurdle for native title groups to jump. In effect, by increasing mandatory regulations on PBCs this feature simply provides another occasion for native title groups and the governance of PBCs to fail with respect to government standards.

Accordingly, SANTS does not support the imposition of further external regulatory requirements on PBCs.

[2] Ibid, See Message 10: Governments and Indigenous people have different criteria for evaluating governance effectiveness

2.2. What are your views on the above mechanisms to enhance transparency and accountability of payments to native title beneficiaries?

- incorporation under CATSI/Corporations Act

In addition to those points outlined above in paragraph 2.1.1, SANTS would further submit that the existing requirements of transparency and accountability under the CATSI Act at times place onerous burdens on native title groups.

- appointing one or two independent directors

Further to the submissions raised in paragraph 2.1.2, SANTS recognises there is indeed scope for strengthening effective governance through the appointment of one or two independent directors. However, SANTS qualifies this position by submitting that the effectiveness in general of this approach will ultimately be determined with reference to the discrete set of circumstances of each native title group on a case by case basis. Consideration must also be made with respect to the prospective appointee(s).

- adopting 'enhanced democratic controls'

In reiterating the submissions made above in paragraph 2.1.3, SANTS does not consider this mechanism to deliver any long term sustainability for native title groups.

- Are there any other mechanisms?

As an alternative framework, SANTS' proposes that these outcomes would be more effectively driven through policies that recognise the fundamental process of **implementation** and **internal capacity building**. It is SANTS' opinion that these initiatives are more likely to acknowledge and encourage important legitimising processes that occur at a local level. This opinion is supported by research findings from the 'Indigenous Community Governance Project', where the authors write:[3]

> *'Government policy frameworks will better support the growth of 'two-way' effectiveness and accountability in Indigenous organisations by adopting a community development approach to governance, which strengthens legitimacy through capacity and institution building rather than focusing primarily on financial and technical compliance' (p xxvi)*

[3] J Hunt and D.E.Smith (2007) CAEPR Working Paper No. 36, p xxvi

Likewise, recommendations from the Joint Working Group on Indigenous Land Settlements Governance Workshop[4] highlighted implementation and capacity building as pivotal for achieving sustainable benefits management in Native Title settlements. Specifically, a key concept to arise from this workshop provided that:

> *'[g]ood governance for PBCs and other Indigenous corporations rests on ensuring strong connections between the organisation and its community, and requires strong processes for community participation'*[5]

SANTS submits that these policies could be driven through a community-based organisational development approach. SANTS proposes further initiatives such as strategic planning, communication strategies and broader land settlement master plans[6] be facilitated and/or delivered at a community level by NTRBs/NTSPs. These initiatives would focus on governance standards such as risk assessment, due diligence and principles of democratic process including the obligations held by both board members and constituents, and ethical considerations regarding campaigning and voting. Importantly, any training would require long term ongoing support to make it effective. Such initiatives reflect a more participatory rights approach to delivering sustainable governance solutions.

These proposals will enable PBCs and native title groups to participate and engage in broader policy frameworks and other initiatives such as 'Closing the Gap'. SANTS is currently active in driving similar policies with native title groups, the Aboriginal Congress of South Australia and the Aboriginal Foundation of South Australia.

Importantly, NTRBs are in a unique position where they can negotiate and work with native title groups to assist with precisely these functions. As an NTSP, SANTS can appreciate the governance nuances faced on a local level by PBCs and other Aboriginal corporations. Nonetheless, SANTS is also in a position to offer services that take into consideration best principles of governance from a national and international perspective, where such principles are deemed relevant and helpful. SANTS is well positioned to develop and deliver a structured program of professional services which meets the specific needs and aspirations of each group on a case by case basis. In acknowledging the discrete nature of

[4] Thursday 8 April 2010
[5] M Edmunds (2010) *Sustainable Benefits Management in Native Title Settlements, Executive Summary: Report to Joint Working Group on Indigenous Land Settlements Governance Workshop, June 2010*
[6] For considered discussion on 'master plans' – refer to P. Agius, Presentation to the Joint Working Group on Indigenous Land Settlement

PBCs across South Australia, SANTS is driving the facilitation of native title groups to manage and take advantage of their determined or negotiated rights and interests in a holistic sense.

Nonetheless, the capacity for SANTS to achieve these outcomes is ultimately limited to the extent of funding allocation. Greater resources and a more flexible service delivery model must be provided to NTRBs to ensure the effective provision of these services. In order to maximise the sustainable function of PBCs and native title groups, it is imperative that the support provided by NTRBs extends beyond the immediate period following the creation of native title agreements to the post native title environment and the establishment of sustainable corporate entities. The fundamental relationship that exists between NTRBs and PBCs in delivering transparency and accountability of benefits to native title groups was recognised by the Joint Working Group on Indigenous Land Settlements, where they determined:

> *'Without ongoing support from NTRBs, PBCs have little capacity to carry out their statutory responsibilities. Government must ensure that NTRBs have adequate resources to carry out this function'*[7]

In highlighting the fundamental importance of the approach advocated by SANTS, one of the key messages determined from the Indigenous Governance Project[8] stated:

> *'Capacity development should be a process that actively strengthens Indigenous decision-making and control over their governance institutions, goals and collective identity, and that enhances cultural match and legitimacy. Governance capacity development within organisations appears to work best when it is: place-based; work and goal orientated based on self-assessed governance priorities; in a relevant form and delivered in ways that are meaningful in terms of local community realities; and sustained and reinforced over the longer-term.'*

- What democratic controls are currently lacking in native title agreements?

It is SANTS' experience that democratic controls will be a natural outcome of agreements where all parties focus on the *processes* in conjunction with *outcomes*. In other words, the approach of SANTS to agreement making has been to place equal value on the 'process' and 'outcome'. The success of this approach is evidenced by the progress and results achieved in South Australia towards agreement making and the resolution of native title.

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[7] Ibid.

[8] J Hunt & D.E. Smith (2005) "Ten key messages from the preliminary findings of the Indigenous Community Governance Project", electronic publication downloaded from http://www.anu.edu.au/caepr/

2.3. Are beneficiaries of native title agreements generally aware of the financial and non-financial benefits they are entitled to? Are native title group members aware of how benefits distribution structures in their agreements work? In your experience, is there a need for greater accountability of directors of entities that receive native title payments?

SANTS has put in place negotiation processes that position the community in direct negotiations and are inclusive of community interests. The authorisation by the community of native title agreements has led to high levels of community understanding about agreement obligations and benefits. Similarly, corporate structures and governance agreements are also community led and driven.

In response to these consultation questions, it is SANTS' submission that facilitating these processes is a central responsibility of NTRBs, native title groups and (at times) negotiating parties. It is not typically a role appropriate for government. In reiterating the submissions outlined above, SANTS is committed to the achievement of these and other sustainable outcomes for native title groups through facilitating processes at a community level. SANTS submits that improving awareness and education within native title groups (i.e. between board and community), will foster a situation where the directors of these entities must demonstrate accountability from an internal perspective. It is SANTS' position that ensuring awareness and accountability within the native title context necessarily requires a greater emphasis placed on the implementation process otherwise provided by NTRBs.

2.4. Do you think any new tax treatment should be conditional on adopting the governance measures and leading practice principles discussed above? Why? Why not?

SANTS supports the building of governance measures in a holistic sense. Furthermore, SANTS believes a flexible tax system that recognises the uniqueness of payments relating to native title will be conducive to wealth creation for native title groups. SANTS does not consider that preferential tax treatment be contingent upon adopting mandated governance measures (beyond current requirements). Accordingly, SANTS does not support this recommendation.

2.5. Are there other mechanisms to incentivise native title groups to adopt the measures and principles discussed above?

Presuming that the appropriate circumstances and processes are provided to facilitate effective governance, SANTS submits that the 'incentives' will lie simply in the ownership over such outcomes.

That is, native title groups aspire to effectively govern their corporate activities in order to facilitate positive outcomes for their members.

3. B.1: REVIEW FUNCTION

3.1. *Do you agree that there is a need to support parties to native title agreements to maximise the positive financial and non-financial benefits from native title agreements? What do you see as the main advantages and disadvantages?*

SANTS agrees that the need to support parties to native title agreements exists. In recognising this need, SANTS has implemented strategic objectives and commitments through policies that assist native title groups in actively managing their native title agreements to ensure that the obligations and expectations arising from these are fulfilled. Importantly, these approaches reflect SANTS' experience that implementation policy is far more than monitoring compliance of agreements. As outlined above, assessing the requisite nature and level of support for each native title group requires consideration of a broad set of social, cultural, economic and political factors. This approach necessarily extends to the provision of services aimed at maximising the positive outcomes from native title agreements. As highlighted in the Joint Working Group on Indigenous Land Settlements Governance Workshop:

> *'The sustainability of agreements depends to a great extent on implementation. Negotiations need to include processes for robust implementation and review from the beginning.'*[9]

SANTS has serious reservations about the proposal to establish a new statutory review function to assess the sustainability of agreements. The proposal does not respect the fundamental right of native title groups to negotiate agreements and deal with their rights and interests as they see fit. Native title groups negotiate agreements in the exercise of their native title rights, and such transactions are made on a private and commercial basis.

Furthermore, SANTS submits that the proposed method of assessment for 'sustainability' fails to contemplate the varying range of local circumstances that provide context and perspective to the creation and effectiveness of native title agreements. It is the experience of SANTS that the best agreements are those that have been necessarily drafted and designed to compliment and reflect the

[9] Edmonds, refer above no 5

specific needs of the respective parties. These are also the agreements that are most actively and effectively monitored to ensure compliance from both ends.

On the limited basis that the proposal is currently made, it is SANTS' opinion that the potentially substantial resources required to initiate such a review function and associated entity would be far more effectively utilised in alternative ventures.

3.2. ***Are there alternatives to the function proposed?***

It is SANTS submission that a major cause for the difficulties experienced in maximising benefits can be associated with the inherent power imbalance that occurs between the parties negotiating these outcomes. SANTS considers that the role of implementation and capacity building is fundamental in ensuring the maximisation of benefits flowing from native title agreements, and indeed for redressing these inequalities to facilitate choice for native title groups. As poignantly identified in the Indigenous Community Governance Project, 'when power inequalities are as great as they currently are, Indigenous groups often feel they have little choice about how they do things.'[10]

Therefore, whilst SANTS does *not* support the proposal, in the event that a review function is introduced SANTS proposes that the mandate of this body be increased to review the *entirety* of the agreement and the agreement process. This would provide an opportunity to evaluate the merits of the agreement on a much more holistic level, rather than superficially reviewing particular clauses from the benefits package in isolation. In repeating the assertions made above, consideration must be made to the local particulars of native title groups, for example, the wide ranging levels of income and capacity. These considerations are fundamental to an appraisal of agreement design and structure.

It is on this limited basis that SANTS provides the following comments in relation to a review function.

3.3. ***Do you agree that these characteristics and roles are appropriate? Are there other principles you would suggest to guide the development of Government policy in this area?***

In expanding on the alternative framework for a review body outlined above, SANTS would recommend the following features as fundamental:

[10] See above no 7, page xvi

- Critically, the review function would need to be completely independent of government. The credibility of such a function would rest on this independence, considering that Government is quite often a party to such agreements. Without securing this independence, there would be a potential conflict of interest that would undermine both the credibility of the function and public confidence in the capacity of the function to perform necessary tasks;

- Ensuring the details of agreements remain confidential;

- Such a review function could be responsible for addressing instances of alleged unconscionable conduct through negotiations and within the making of agreements;

- The function could provide a point of contact for native title groups seeking further advice on particular aspects of agreements or potential agreements to which they are a party;

- The review function could issue guidelines and comments for best practice principles;

- A regular reporting function; and

- Monitoring compliance and implementation, in particular the power to investigate and mediate where there is a failure to meet contractual obligations from either party.

SANTS considers that the success of such a review function will lie in the ability that this entity has to redress the significant power imbalances prevalent in the negotiation and formation of native title agreements. Specifically, this imbalance could be redressed through greater transparency around agreements and through the standardization of best practice, increasing obligations around industry compliance with these benchmarks. In a similar fashion to the Australian Competition and Consumer Commission, it is SANTS' opinion that these features should begin to provide an avenue for native title groups to level the playing field in the pre and post agreement stages. Of course, the degree to which such a review function could assist in this process will be contingent upon the integrity of this entity to function independently.

3.4. ***What are your views about these functions?***

In the event that the review function is implemented, SANTS agrees in principle with those functions outlined in the Consultation Paper. However, SANTS would provide that in addition to 'some' native title agreements being assessed, the review function should have the power to assess any agreement

where such a request has been made by the respective native title group. Furthermore, as reiterated above, 'assessment' in this sense should not be limited to the consideration of 'leading practice principles'. SANTS considers that any meaningful assessment will necessarily include consideration of a range of 'intangible' factors specific to the discrete nature of the native title group.

3.5. ***Are there other functions you would suggest?***

Further to those suggestions already made in paragraph 3.3 above, SANTS submits that prior to any decisions being made with respect to the review function, further consultation within the Aboriginal and Torres Strait Islander community and amongst native title groups is required. Tailoring the nature of the review function to meet the needs and experiences of those people within native title groups will enhance opportunities for effective Aboriginal and Torres Strait Islander participation.

3.6. ***Would this function be more effective in an existing body or a new body?***

SANTS considers that this function would be significantly more effective as a new body. It is SANTS' submission that the successful implementation of this review function depends upon its legitimacy within the native title context, and therefore should develop its own identity and culture as a new body. The establishment of a new body would foster the spirit of these proposed amendments in working to create transparency and best practice.

Accordingly, SANTS does not consider ORIC as an appropriate body to adopt the review functions proposed. ORIC's statutory responsibility in policing compliance under the CATSI Act creates a significant power imbalance between ORIC and those PBCs subject to regulation. As outlined above, addressing the various power imbalances faced by native title groups will be fundamental to the efficacy of a review function. Consequently, it is SANTS' submission that ORIC lacks the requisite neutrality to facilitate the aims of this proposal.

3.7. ***Do you have any comments on the proposed scope of agreements requiring registration?***

SANTS' submits that the review function should have the flexibility to consider *all* native title agreements where requests for review have been made by the respective native title group. SANTS' tentatively proposes that a threshold test may be necessary to determine which agreements should attract a review. Nonetheless, SANTS considers that these threshold questions must be substantially

informed through the process of further consultations. Furthermore, SANTS would be wary of ensuring that the proposed functions do not duplicate any existing processes.

For SANTS' opinion on the definition of 'native title agreements' please refer to paragraph (g) of the submissions made in response to 'Native Title, Indigenous Economic Development and Tax'.

3.8. ***Should it extend to settlement agreements, and/or trust deeds and other benefits management mechanisms?***

Refer to paragraph 3.7 above.

3.9. ***In your experience, what are the elements of agreements that promote sustainable benefits?***

As outlined above, it is SANTS' experience that there are a diverse range of factors taken into consideration in the formation of native title agreements. Likewise, the most successful agreements are those that necessarily contemplated the local complexities of the negotiating native title party. Accordingly, whilst SANTS agrees in principle to the importance of those leading practice principles outlined in the Consultation Paper, SANTS does not consider this to be an exhaustive list of criteria for which agreements should be reviewed against. Importantly, there are a number of intangible considerations that should be recognised as giving context to native title agreements. An effective assessment of sustainability by extension must take these factors into account.

It is SANTS experience that the *processes* involved with forming native title agreements are often just as significant as the outcomes of these agreements. By including the specific local contexts of agreements within the assessment, the review function will have greater potential to facilitate fundamental processes that underwrite native title agreements.

3.10. ***What do you see as the advantages and disadvantages of incorporating leading practice in legislation?***

SANTS does not consider legislating best practice principles as a guaranteed mechanism to achieving best practice outcomes. Whilst recognising some scope for legislative reform in this area, SANTS submits that a continued dialogue is necessary with the native title sector to determine the effectiveness of such a scheme and the practical implications that this may carry. In considering this proposal, SANTS recognises the limitations of a national regime with respect to the diverse experiences

across Australia. SANTS' would further submit that taking into consideration the dynamic state of native title law in Australia, one disadvantage of incorporating these principles into legislation would be the difficulty to amend these once enacted.

3.11. ***How useful are model terms? What elements could be covered by model terms?***

It is SANTS' practical experience that there is scope for the effective use of precedents in the drafting of native title agreements (see also paragraph 3 below). The utility of precedents will often be determined with respect to the integrity of their source. Nonetheless, as emphasized throughout these submissions, the use of precedents, and by extension, model clauses will only provide for sustainable agreements to an extent. Critically, the use of these devices must not supersede reference to local particularities in the context of making agreements. Consequently, caution must be exercised when using model terms to ensure that they are relevant to the specific nature of the agreement being negotiated. In essence, it is SANTS' submission that such devices should not be used without first scrutinizing the practical relevance of these terms on a case by case basis. Indiscriminate use of model terms may in fact undermine the sense of ownership over an agreement by a native title group. SANTS has, however, successfully established and utilised template (model) ILUAs in the negotiation of agreements under the Statewide South Australia Native Title Resolution Strategy (SANTR). The template ILUAs have been utilised as a starting point in negotiations to maintain the integrity of the negotiation while also streamlining the negotiation process.

3.12. ***Should all agreements be eligible to be assessed for sustainability, or should some classes of agreements be omitted, for example exploration-related agreements?***

Refer to paragraph 3.7 above

4. B.2: LEADING PRACTICE AGREEMENTS TOOLKIT

In SANTS' experience, there are significant advantages in the sharing of certain accumulated knowledge between organisations that undertake similar work in the native title area. In recognising the benefits to arise from such arrangements, SANTS strongly supports the recent undertaking by AIATSIS in the development of an agreement precedents database. Whilst still in the pilot stages, it is SANTS' submission that this approach should be used as a model in informing the style and design of such a proposal.

4.1. ***In your experience, what information resources are difficult to obtain when planning, negotiating and implementing native title agreements?***

Through the years, SANTS' has developed relationships with other NTRBs to share and facilitate access to a range of practice agreements. These arrangements have provided SANTS an opportunity to develop and accumulate our scope of corporate knowledge, which in turn places us in an improved position to serve our clients. Nonetheless, the consolidation of these materials in a 'one stop shop' would further streamline the effectiveness of this process.

4.2. ***What types of content/guidance should the toolkit cover?***

For reasons outlined above (refer to paragraph 3.11), SANTS' expresses strict reservations in the effectiveness of 'transplanting' information from one context and applying it to another. Accordingly, SANTS submits that information included in the guideline proposed would need to be broad enough to contemplate content on the local level. Considering the dynamic nature of native title, ongoing resources would also need to be committed to this project to ensure that information is regularly updated and assessed for relevancy and best practice. This process would be fundamental in sustaining the integrity of such a toolkit.

In particular, SANTS would further submit that content relating to free prior and informed consent should necessarily form part of the body of knowledge to be included in the proposal. Otherwise, SANTS' considers that all aspects of agreements could potentially be covered in the toolkit.

4.3. ***What sorts of individuals or groups would access the toolkit?***

In view of SANTS' policy to promote a facilitative approach in supporting native title groups, SANTS submits that all parties should have access to this toolkit. It is the experience of SANTS that whilst other parties to native title agreements may have collective knowledge compounded by a variety of dealings with different native title groups, individual native title groups will quite often have no previous knowledge or accumulated experience in negotiating these agreements. SANTS considers that providing native title groups with access to this resource is likely to assist the process of addressing disparate power positions between parties to these agreements. This will be a helpful resource in fostering future relationships, and providing the scope for parties to work together.

4.4. ***How could the toolkit address some of the difficulties associated with negotiating and implementing native title agreements?***

Refer to paragraph 4.3 above. SANTS submits that these outcomes would be further consolidated where coupled with legislative reforms on good faith requirements.

5. C.1: STREAMLINED ILUA PROCESSES

From a general perspective, SANTS' has not experienced the difficulties outlined in the Consultation Paper with respect to the ILUA registration process. This experience is largely the result of two key factors:

- SANTS' implementation of agreement making processes which facilitate participation, inclusion and awareness within the native title context in South Australia; and
- The Statewide (SANTR) ILUA approach adopted by SANTS in conjunction with the South Australian State Government.

These approaches have resulted in sustaining the South Australian native title community's awareness of the nature and scope of proposed ILUAs. In particular, SANTS has placed significant impetus on ensuring due processes of negotiation, authorisation, notification and consultation are followed in progressing the registration of ILUAs. Furthermore, SANTS has actively worked at establishing effective communication networks between individuals, communities and other related parties. This process has resulted in a dramatic reduction of objections in relation to ILUA registration. As such, SANTS has actively engaged the native title community to secure effective and otherwise streamlined processes for ILUA registration.

Therefore, whilst SANTS' welcomes considered debate into reforms of the native title system, it is SANTS' opinion that greater emphasis should be placed on policies that recognise the importance of integrating processes at a community level. SANTS submits that alterations to the current legislative framework will only provide a superficial solution to those difficulties outlined in the Consultation Paper.

5.1. ***What measures do you think could be implemented to reduce ILUA registration timeframes?***

In drawing on the experiences outlined above, SANTS submits that facilitating due process is a key element in ensuring effective and sustainable ILUAs. It is SANTS' experience that ILUA registration

timeframes have not placed our clients at a disadvantage, due to statewide processes focussing on strategic prioritisation for resolution of claims for the whole state. Nonetheless, SANTS would support a reduction in registration timeframes provided that this did not compromise the requirements of notice in practice.

5.2. ***[Of the proposals already suggested] What do you see as the advantages or disadvantages in altering the registration process when an ILUA has been certified by an NTRB?***

SANTS recognises that despite best efforts, there is always the potential for NTRBs to miss people out in the negotiation and certification process. Furthermore, SANTS' appreciates that timeframes for notification have been introduced to provide necessary safeguards for the community. It is SANTS' submission that the detriment incurred by claimants who may not agree with the decision to make the ILUA is substantial and should be a central factor in the consideration of reforms within this area.

5.3. ***Do you think a reduction in the notification period will contribute to an improvement in the efficiency of the registration process? Are there other stages in the registration process that could be targeted instead?***

As submitted in paragraph 4 above, SANTS considers that improvement in the efficiency of the registration process should be driven by initiatives that focus on processes taking place at the community level.

5.4. ***Would there be a benefit in broadening the information included on the Register?***

Importantly, SANTS' considers that access to information is essential for native title groups. The vetting of confidential and commercial information could be achieved through the review function proposed above, or the AIATSIS precedent database that is currently being developed.

5.5. ***Keeping in mind the need for culturally sensitive and commercial information to be kept in confidence, what additional information would be useful for parties negotiating ILUAs?***

Refer above to the general submission made in paragraph 4.

5.6. ***Should the Act be amended to permit minor amendments to registered ILUAs without the requirement to go through the registration process again?***

SANTS supports this proposal, where those minor amendments are of the type outlined below in paragraph 5.9.

5.7. ***What are the advantages or disadvantages in establishing an alternative streamlined procedure to allow minor amendments to a registered ILUA?***

In SANTS' experience, significant difficulties are often faced where the process of re-registration is required. Consequently, such a process is often onerous, being both time and resource intensive. In light of this experience, SANTS would support establishing an alternative streamlined procedure for minor ILUA amendments for the purposes of increasing workability. Refer to paragraph 5.9 below for SANTS' definition of 'minor'.

5.8. ***What should a procedure look like, and what at a minimum should it include?***

SANTS' suggests that such a procedure could be by agreement between the parties, which is then evidenced by a signed letter from representatives to the NNTT.

5.9. ***What do you consider to be a minor amendment?***

SANTS submits that a minor amendment would be anything that the parties identify as minor, but should not extend to aspects such as:

- Benefits
- Native title consent
- Beneficiaries

Examples of such minor amendments would include those clauses that consider purely administrative content like time frames, dates, and notice provisions.

6. C.2: CLARIFYING GOOD FAITH REQUIREMENTS

SANTS supports the proposal to clarify good faith requirements under the Native Title Act. SANTS considers that this clarification will assist in encouraging parties to participate effectively in future act discussions under the relevant provisions.

6.1. ***How should the Act be amended to achieve the Government's objective to clarify what negotiation in good faith entails? Can you identify any advantages or disadvantages to particular approaches?***

SANTS submits that good faith requirements could be clarified by outlining indicia for categories of good faith. SANTS further submits that a framework for good faith negotiation could proscribe a positive onus being placed on an applicant to the NNTT to demonstrate that they have negotiated in good faith, or alternatively, that the respondent has failed to negotiate in good faith. This determination could be made by cross referencing the indicia of 'good faith'.

Alternatively, SANTS submits that a similar model to section 228 of the *Fair Work Act 2009* could be adopted. This model supports the process of good faith negotiations without compelling parties to reach an agreement from the discussions.

6.2. ***In good faith negotiations, do you consider there would be a benefit achieved by a statutory requirement for parties to reach substantive agreement before an application is made to the NNTT for a determination? Are there any problems with this approach?***

It is SANTS experience that in reality, substantive agreement between parties despite best endeavours may sometimes be unachievable. Accordingly, SANTS does not support creating such a statutory requirement.

6.3. ***Should the amendments clarify that good faith negotiations require parties to negotiate about each particular act, as opposed to more general negotiations about a range of acts?***

It is SANTS' submission that the principles of good faith negotiation should be enshrined in legislation to apply across the full spectrum of native title agreements.

7. CONCLUSION

SANTS considers these submissions as the first step in a consultation process that will continue to engage a range of different perspective and voices within the native title community. SANTS believes that the best reforms and innovations within the native title context will necessarily be distilled through a considered and extensive consultation process. Accordingly these submissions have been informed by drawing on the collective expertise of those people working within SANTS and the native title

community in South Australia. Likewise, many of the ideas presented through these submissions will require further refinement should they be effectively carried into effect. Underlying these submissions, however, lies the fundamental principle of effective participation. As the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda stated at the recent 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 ale 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.'*

SANTS looks forward to working with the Commonwealth and other stakeholders to continue to develop and refine future legislative and policy reforms in the improvement of native title within Australia.